APPENDIX

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WILLIAMS, Appellee,

v

AETNA FINANCE COMPANY,
d.b.a.. ITT Financial Services, Appellant, *et al.*

No. 97-1670

Supreme Court of Ohio

Submitted May 26, 1998
Decided November 4, 1998

APPEAL from the Court of Appeals for Hamilton County, Nos. C-960234 and C-960255

In late November 1989, Christopher Blair came to the home of plaintiff-appellee Mildred Williams and had a short conversation with her. Blair told Williams that he had noticed that her house was in need of some repairs. Williams responded that she was aware repairs were needed, but that she was unable to get a loan to get the work done. Williams, a sixty-six-year-old widow, was alone in her home at the time, and did not allow Blair to enter. He told her he would return later to speak to her again.

Blair was a pitchman who attempted to convince homeowners to have work done on their houses. He did not do the work himself, but contracted it out to others. At the time he solicited Williams to have her house worked on, Blair was doing business as Homestead Construction Company.

Blair returned to Williams's house again in either late November or in early December. Her grandsons were present at the time, so Williams allowed Blair to enter her home. Blair showed her pictures of what her house could look like with repairs done to the exterior. Williams, who was interested in what Blair had to say, told him she also needed repairs done on the interior of the house.

Blair was seeking business in Williams's neighborhood because he knew that there were a lot of elderly people in the area who had owned their homes for a long time, so that many were free of mortgages. He did not know that Williams owned her home free of a mortgage until he talked to her. Once he found out from her that she had built up equity

in her house, he was interested in doing business with her. Blair told Williams he could get her a loan to finance the improvements to her house, even though she again told him she had been unable to get a loan in the past to get the needed repairs done.

Williams signed a contract dated December 1, 1989 with Blair, to have work done on both the interior and exterior of her house, for $11,500. On either December 5 or December 6, an employee of Blair transported Williams to the Loveland, Ohio branch office of defendant-appellant Aetna Finance Company, d.b.a. ITT Financial Services ("ITT"), to obtain a loan to finance the home repairs. Even though another branch office was closer to Williams' home, she was taken to the Loveland branch because Blair frequently referred prospective loan applicants to that branch. The branch manager at Loveland, Tom Scholl, had contacted Blair in early 1988 seeking referrals of loan customers. Blair had been designated an approved "referral source" by ITT, a special status that allowed loan customers referred by Blair to receive preferential handling of their loans based on the fact that they dealt with Blair.

At her first visit to the ITT Loveland office, Williams agreed to the first of two loan contracts she would make with ITT. She borrowed $3,769.95 at an annual interest rate of 27.4 percent. The loan was secured by Williams's television set and stereo, with the total value of those two items listed as $650. Williams also turned over the title to her 1980 Buick automobile as security on the loan. ITT charged her a total of $155 for a loan origination fee and a recording fee. She was also sold insurance on her television set and stereo, as well as life insurance, for a total of $164.80. Williams was to pay $125 per month for a four-year period on the loan.

The loan proceeds from this first loan were paid to Williams in two checks, both made payable to her. One check, for $450.15, was for Williams's personal use. The other check, for $3,000, was to be a down payment on the remodeling work. At the ITT office, Williams signed that

check over to Blair and gave it to Blair's employee who had transported her there.

On December 13, 1989, another of Blair's employees brought Williams to the Loveland branch office to do the paperwork to get a larger loan to finance the work on her house. This loan was designed as a debt consolidation loan, and was secured by a mortgage on Williams's real estate. Williams signed a $12,936.64 promissory note at an annual interest rate of 17.81 percent, to be repaid at $190 per month over fifteen years. ITT charged her $1,034.93 for a loan origination fee and points, and also charged Williams $25 for a commitment letter. Williams was charged a total of $417 for the recording fee, title insurance, title search, and appraisal.

Some of the loan proceeds were to be used to pay off Williams's first loan. The proceeds were also to be used to pay off Williams's outstanding credit card debts of $3,326.04 to Visa, L.S. Ayres, and Sears. The remainder of the proceeds was meant to finance the improvements to her home. Williams did not receive any of the proceeds at this time.

On December 19, 1989, Williams was again transported to ITT's Loveland office by employees of Blair. At that time, the second loan was finalized. As a result, the earlier loan was paid off and Williams received the proceeds of the second loan, as set up on December 13, in five checks. Four checks, made jointly payable to Williams and the credit card companies, were used to pay off those debts. Another check, for $4,492.12, was made payable to Williams. Williams endorsed that check at the ITT Loveland office, and gave it to one of Blair's employees.

At the time these loans were made, Williams's income was either $420 or $430 per month. She was making monthly payments of more than $190 per month on credit card bills and other debts prior to signing the loan agreements with ITT.

After Blair received payments from Williams via the ITT checks she signed over to him, workers came to her house in late December 1989 and early January 1990 and did some work on the house. However, the workers did only a small

part of the work that Williams had agreed with Blair would be done. The work done was not what Williams wanted, and most of the work was never done at all. After starting the work, the workers did not return to finish it. Williams attempted to call Blair numerous times to inquire about the failure of the workers to do the job to her satisfaction, but he never answered her inquiries.

Williams made two payments on her loan with ITT, and then stopped making payments when it became evident to her that the work would not be finished. In April 1990, she filed suit in the Court of Common Pleas of Hamilton County against, *inter alios*, Christopher Blair, d.b.a. Homestead Construction Company, and ITT. Williams claimed violations of the Ohio Consumer Sales Practices Act ("CSPA") and Ohio Home Solicitation Sales Act ("HSSA"), breach of contract, and civil conspiracy. She sought compensatory damages, attorney fees, costs, and punitive damages. Blair, who eventually went bankrupt, was never served with the complaint. ITT was the only defendant served and became the only defendant against whom recovery was sought.

ITT filed a motion with the trial court to compel arbitration pursuant to the arbitration clause contained in the loan agreement Williams signed with ITT, and to stay the trial court proceedings pending arbitration. The loan agreement contained a broad arbitration clause providing that any dispute between Williams and ITT, "other than judicial foreclosures and cancellations regarding real estate security, * * * shall be resolved by binding arbitration."

Williams opposed ITT's motion primarily on equity grounds, claiming that the arbitration provision was unconscionable, deceptive, and unfair, and therefore unenforceable. The trial court, in a judgment entered on August 13, 1990, denied the motion to compel arbitration without giving a reason for the denial. ITT appealed to the Court of Appeals for Hamilton County, which affirmed the trial court's ruling, finding that Williams's "complaint challenges the existence of a contract between the parties and, therefore, the arbitration clause in the loan agreement may not be enforced until the question of the existence of the contract is resolved."

Williams v. Aetna Fin. Co. (Aug. 9, 1991), Hamilton App. No. C-900663, unreported, 1991 WL 433751.

ITT appealed the judgment of the court of appeals to this court, which allowed the discretionary appeal. *Williams v. Aetna Fin. Co.* (1991), 62 Ohio St. 3d 1484, 581 N.E.2d 1390. After full briefing and oral argument, this court dismissed the appeal as having been improvidently allowed. (1992), 65 Ohio St. 3d 1203, 602 N.E.2d 246.

On February 26, 1993, ITT moved the trial court for an evidentiary hearing regarding the validity and enforceability of the arbitration provision. The trial court denied the motion, finding that its earlier decision denying arbitration had been affirmed on appeal, and that the motion was repetitious of ITT's earlier motion to compel arbitration.

A week after the court of appeals' decision upholding the trial court's denial of the motion to compel arbitration, Williams amended her complaint to allege that she was a victim of a scheme of fraudulent misrepresentation. ITT interposed a counterclaim against Williams for her failure to pay on the promissory note. After the trial court denied several pretrial motions by ITT, including a motion for summary judgment, the case proceeded to a jury trial.

Williams's principal claim at trial was that Blair and ITT collaborated in a scheme to defraud unsuspecting, unsophisticated homeowners, particularly preying on elderly African-Americans, such as Williams, in certain specific low-income neighborhoods. Williams alleged that Blair did not really intend that the work contracted for by these homeowners would be done, and contended that ITT was an integral part of Blair's schemes by supplying the loan money to the homeowners who entered into contracts with Blair, so that Blair would receive the proceeds of the loans. Williams claimed that ITT benefited by making high-interest, low-risk, secured loans and exploited the unsuspecting homeowners, while ITT knew that the work contracted for with Blair would never be done. To support her claims, Williams presented the testimony of other homeowners who explained their dealings with Blair and ITT. Testimony was also elic-

ited from Blair and from former employees of ITT by Williams to sustain her position.

Williams presented her situation as typical of the scheme Blair pitched to the homeowners, put on testimony to support her argument that she was targeted by ITT and Blair, and urged through the witnesses presented that she and other homeowners had been victimized by ITT's two-step loan process, whereby ITT first made a small personal loan and then shortly after replaced it with a second large home equity loan, generating extra closing costs and fees. Williams presented circumstantial evidence in an attempt to have the jury draw inferences built on her allegations that ITT made the loan to her with the knowledge that her monthly income was insufficient to make the monthly payments required, and that ITT may have planned to foreclose if she did not make the payments.

Williams also presented several witnesses who testified that ITT employees were accepting payments directly from Blair to cover loan payments not being made by his home improvement customers whose work was not being done, to show that ITT employees were aware that the work Blair had solicited was not being completed. Several witnesses testified to the close relationship Blair had with several ITT loan officers, including the branch manager at the ITT Loveland branch where Williams obtained her loans. Testimony also was presented that the term "Blair loan" had taken on a special meaning at several ITT offices prior to the time Williams dealt with ITT, to indicate the peculiar type of problem loans being made to Blair's customers. In addition, an attorney who represented some dissatisfied customers of Blair testified that he had filed a lawsuit against Blair and ITT, among others, in August 1989, and had won a default judgment.

ITT's principal defense throughout the trial was that Blair was not ITT's agent and that the alleged frauds committed by Blair should not be attributed to ITT. ITT further argued that the home improvement contracts entered into by the homeowners with Blair were separate transactions from the loan agreements signed by the loan applicants and ITT. ITT pointed out that Williams had agreed to accept the loans after

full disclosure of the interest rates and payment schedules. ITT also in essence urged that the loans would have been approved by ITT even if Blair had not referred the applicants, and that ITT's loan practices with regard to the loan applicants referred by Blair, including Williams, were no different from its practices with other customers of ITT.

At the conclusion of the trial, the jury found in favor of Williams on her claims and awarded her $15,000 in compensatory damages and $1.5 million in punitive damages, and found her entitled to attorney fees. In answering interrogatories, the jury specifically found that (1) ITT participated in a conspiracy that damaged Williams, (2) ITT violated the Ohio Consumer Sales Practices Act and thereby damaged Williams, (3) ITT engaged in a fraud that damaged Williams, (4) ITT breached a contract with Williams, and (5) Williams did not breach a contract with ITT. The jury also found in favor of ITT on its counterclaim, and awarded ITT $3,326.04 (the precise amount of credit card debt paid off by Williams using proceeds from her home equity loan from ITT).

After trial, the trial court denied ITT's motions for judgment notwithstanding the verdict, for an order overturning the results of the trial and compelling arbitration, and for a new trial, and entered judgment on the jury's verdict.[1] On

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[1] When the trial court ruled on these motions, it took the opportunity to "point out" the following observations:

"1) ITT appointed Chris Blair as its 'dealer' and this appointment was made in writing."

"2) ITT knew that Blair was securing customers for ITT by soliciting elderly, low income customers for home improvements."

"3) Long before Mildred Williams was solicited, ITT knew that Blair was not doing the home improvement work for which he was paid."

"4) ITT targeted Mildred Williams' home before Blair made his first contact with her."

Williams's application for attorney fees, the trial court awarded $56,230.

ITT appealed to the Court of Appeals for Hamilton County, and Williams cross-appealed. That court affirmed the judgment of the trial court on the jury's verdict. The determinations of the court of appeals relevant to our consideration here were as follows: (1) The arbitration clause should not now be enforced after a full trial had been held, because to do so would be a "colossal waste of resources," and ITT was not "materially prejudiced" by the denial of its motions to compel arbitration; (2) the trial court erred in allowing Williams to pursue a theory of recovery against ITT based on an agency relationship between Blair and ITT because Blair was not ITT's agent as a matter of law, but ITT was properly found liable to Williams on a civil conspiracy

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"5) The evidence showed that ITT participated in a collaboration with Blair to enter this home improvement scheme against Mildred Williams."

"6) ITT received and retained the fruits of Blair's activities when it retained the car title and retained the mortgage on Mrs. Williams' home—its benefits from Blair's activities."

"7) ITT retained these benefits with full knowledge of what Blair was doing and what he was not doing."

"8) The evidence clearly supported a judgment on fraud, conspiracy[,] the OSCPA violations, and breach of contract."

"9) The evidence also supported a jury's finding of the $15,000 in compensatory damages, reduced by the $3,326.04 which plaintiff asserted was used to pay off Mrs. Williams' pre-existing credit card obligations."

We note that ITT vigorously opposed some of the factual assertions made by Williams implicated in the above points, that the jury's answers to interrogatories do not definitively indicate the jury's conclusions on several of the points, and that some of the points listed therefore appear to be the trial judge's personal conclusions based on the evidence presented.

theory, and enough evidence was presented to the jury to sustain the verdict in favor of Williams on that ground; (3) the trial court did not err in submitting Williams's claims for violations of Ohio's CSPA and HSSA to the jury; and (4) the punitive damages awarded against ITT were not so excessive that the award violated due process. ITT has appealed the judgment of the court of appeals upholding the jury's damage awards to this court.

The court of appeals reversed on the two issues Williams cross-appealed on, one dealing with the way the trial court entered judgment on the jury's verdict to start the running of postjudgment interest, and the other concerning the trial court's award of attorney fees. The court of appeals ordered that postjudgment interest should begin to run on an earlier date than had been ordered by the trial court, and also remanded to the trial court for a new determination of attorney fees. ITT has not appealed the rulings on Williams's cross-appeal to this court.

The cause is now before this court pursuant to the allowance of a discretionary appeal.

William H. Blessing, for appellee.

Dinsmore & Shohl, Mark A. Vander Laan, M. Gabrielle Hils, Jeffrey R. Schaefer and *Anthony J. Celebrezze, Jr.*, for appellant.

Dreher, Langer & Tomkies, L.L.P., Darrell L. Dreher and *Jeffrey D. Quayle*, urging reversal for *amici curiae*, Ohio Consumer Finance Association and Ohio Bankers Association.

ALICE ROBIE RESNICK, J. This appeal presents four principal issues for our review: (1) whether the trial court properly denied ITT's motion to compel arbitration; (2) the propriety of the grounds for Williams's recovery against ITT, under a theory of civil conspiracy, upheld by the court of ap-

peals; (3) whether ITT was found derivatively liable for punitive damages based on a third party's violations of the CSPA and HSSA; and (4) whether punitive damages were improperly assessed, and whether the amount of punitive damages awarded is so excessive that a due process violation occurred. For the following reasons, after a comprehensive review of the record, we affirm the judgment of the court of appeals on each issue.

I

Arbitration

ITT argues in its fourth proposition of law that the broad arbitration provision in the loan agreement for the home equity loan Williams signed with ITT should have been enforced, and that this case should never have proceeded to trial. Furthermore, ITT takes issue with the court of appeals' determination that ITT was not "materially prejudiced" by the trial court's refusal to compel arbitration. The court of appeals found no prejudice, stating that ITT got the "real thing" (a trial) and also that "[a]rbitration is merely a substitute for litigation."

ITT cites a long line of Ohio and federal cases, including cases decided by this court and by the United States Supreme Court, to support its arguments regarding a strong policy in favor of enforcement of arbitration clauses in written agreements. See, *e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270; *Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995), 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753.

We agree with ITT that this court's precedents do indicate that arbitration is encouraged as a method to settle disputes. See, *e.g.*, *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St. 3d 498, 692 N.E.2d 574; *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St. 3d 661, 687 N.E.2d 1352; *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St. 3d 708, 711-712, 590 N.E.2d 1242, 1245. A presumption favoring arbitration arises when the claim in dispute falls within the scope of the arbitration provision. An arbitration clause in a contract is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope

of the arbitration clause, and, with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected. See *Council of Smaller Enterprises*, 80 Ohio St. 3d at 668, 687 N.E.2d at 1357.

R.C. 2711.01(A) provides that a provision in a written contract such as is at issue in the present case "to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract * * * shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract."

We have carefully examined the record, and we acknowledge, as the court of appeals did, that nowhere in the record did the trial court make a specific determination that the arbitration clause was unenforceable on equitable grounds, such as unconscionability. The trial court merely found the arbitration clause invalid, but gave no reason for the finding of invalidity. The record reveals that, given the procedural history of this case on the arbitration issue, the trial court may have been somewhat confused on what effect the resolution of the appeal on that issue by the court of appeals (left untouched by this court's decision to dismiss the further appeal) had on subsequent proceedings on remand.

This court's precedents, as well as the directives of the United States Supreme Court, call into question some of the conclusions reached by the court of appeals regarding the enforceability of the arbitration provision at issue. Nevertheless, while not necessarily agreeing with all of the statements made by the court of appeals in support of its ultimate conclusion upholding the ruling of the trial court regarding arbitration, we do agree with that ultimate conclusion on this issue.

The record in this case clearly would support a finding that the arbitration clause violated principles of equity, given all of the attendant facts and circumstances. Williams filed an affidavit in the trial court regarding the arbitration clause's inclusion in the loan agreement, to support her challenge to the specific validity of the arbitration clause. After taking into account both the procedural and substantive

progress of this case, we find that the complete record compels the conclusion that the trial court, while not specifically declaring the arbitration agreement to be invalid (*i.e.*, because the arbitration clause itself was unconscionable), did in essence make that determination.

The trial court was entitled initially to view the arbitration clause at issue with some skepticism. In the situation presented here, the arbitration clause, contained in a consumer credit agreement with some aspects of an adhesion contract, necessarily engenders more reservations than an arbitration clause in a different setting, such as in a collective bargaining agreement, a commercial contract between two businesses, or a brokerage agreement. See, generally, 1 Domke on Commercial Arbitration (Rev. Ed. 1997) 17-18, Section 5.09. When the further complete situation of this case is taken into account, *i.e.*, Williams's evidence regarding the conspiracy between ITT and Blair as the fundamental reason for her entering into the loan agreement in the first place, and also the questionable conditions under which the dispute would be submitted to arbitration as revealed in the record, there is further support for the invalidity of the arbitration clause.

A virtually identical arbitration clause was challenged as unenforceable in *Patterson v. ITT Consumer Fin. Corp.* (Cal. App. 1993), 14 Cal. App. 4th 1659, 18 Cal. Rptr. 2d 563. In *Patterson* the court considered whether the loan agreement was an adhesion contract on facts virtually the same in all relevant respects to the loan agreement at issue in the case sub judice, and determined that it was "indisputable that the contract was one of adhesion." 14 Cal. App. 4th at 1664, 18 Cal. Rptr. 2d at 566.

The court examined the one-sided rules establishing the prerequisites to achieving an arbitration hearing, and also considered that a consumer was required by the rules to prepay a substantial amount of fees as a condition precedent to arbitration. The court concluded, "The likely effect of these procedures is to deny a borrower against whom a claim has been brought any opportunity to a hearing, much less a hearing held where the contract was signed, unless the borrower has considerable legal expertise or the money to hire a

lawyer and/or prepay substantial hearing fees. * * * In a dispute over a loan of $2,000 it would scarcely make sense to spend a minimum of $850 just to obtain a participatory hearing." *Id.* at 1666, 18 Cal. Rptr. 2d at 566.

The *Patterson* court held that this arbitration provision was unconscionable, and thus unenforceable: "The contractual risk of a dispute resolution process which is weighted heavily against the borrower being able to obtain a hearing seems particularly unreasonable in light of the much greater bargaining power of ITT and its reluctance to disclose even the mechanics of [the] arbitration until it makes an arbitration claim." *Id.* at 1666, 18 Cal. Rptr. 2d at 567.

The parallels between the *Patterson* case and the case before us are striking. *Patterson* involved small consumer loans made by ITT on preprinted forms similar to the form signed by Williams, with a virtually identically worded arbitration clause. Consequently, based on the specific circumstances present here, we determine that the trial court's decision denying ITT's motion to compel arbitration was tantamount to a finding that the agreement to arbitrate was invalid, and further that the arbitration provision was unconscionable. We determine that any presumption in favor of arbitration was overcome based on the entire record of this case. Furthermore, we believe that the presumption in favor of arbitration should be substantially weaker in a case such as this, when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.

We recognize that the failure of the trial court to make a specific determination of unconscionability on the record made ITT's appeal more difficult to frame. However, we determine that this case properly proceeded to trial, and we find no merit in ITT's fourth proposition of law.

II

Civil Conspiracy

At the court of appeals, ITT challenged the theories of recovery relied upon by Williams at trial. The court of appeals

sustained ITT's arguments in part, finding that Blair was not acting as an agent of ITT, as a matter of law, when he induced Williams to contract with him to do the improvements on her home. We agree with the court of appeals that no agency relationship between Blair and ITT was shown. However, while finding that the jury's verdict could not be sustained on agency grounds, the court of appeals further upheld the jury verdict against ITT based on Williams's additional claim that ITT participated in a civil conspiracy against her. The jury, in its answer to interrogatory number one, specifically found that ITT participated in a conspiracy that damaged Williams.

In upholding the jury's verdict against ITT, the court of appeals determined that ITT violated a duty to disclose (arising in the "special circumstances" of this case) to Williams based on ITT's knowledge of the fraudulent activities of Blair, as asserted by Williams at trial. The court of appeals held that this fraudulent concealment of material information by ITT was ITT's contribution to the civil conspiracy perpetrated by Blair and ITT on Williams, and that this concealment justified the jury's verdict against ITT.

In its first proposition of law, ITT takes issue with the court of appeals' determination that a duty to disclose owed to Williams, based on special circumstances, was violated by ITT. ITT urges that the relationship of a borrower to a lending institution is not a fiduciary relationship, that there is no duty to speak, and that the "special circumstances" exception to this rule adopted by the court of appeals is "so vague and standardless as to be unworkable." See, *e.g.*, *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St. 3d 98, 519 N.E.2d 363, paragraph two of the syllabus ("A creditor and consumer stand at arm's length in negotiating the terms and conditions of a consumer loan and, absent an understanding by both parties that a special trust and confidence has been reposed in the creditor, the creditor has no duty to disclose to the consumer the existence and details" regarding aspects of the transaction.); *Ed Schory & Sons, Inc. v. Francis* (1996), 75 Ohio St. 3d 433, 442, 662 N.E.2d 1074, 1081 (a fiduciary relationship between a debtor and a creditor may be created

out of an informal relationship only when both parties understand the existence of a special trust or confidence).

We do not view this case the same way the court of appeals did. Although we affirm the judgment of the court of appeals that, on the facts of this case, the jury verdict against ITT can be upheld for ITT's role in a civil conspiracy with Blair against Williams, we disagree with the reliance by the court of appeals on the "special circumstances" exception to the general rule of no duty to disclose.

Consequently, we disagree with the analysis of the court of appeals. Because our analysis differs from that of the court of appeals, we do not approach the resolution of ITT's first proposition of law in the manner the issue is presented by ITT, but instead explain why ITT's contentions regarding a duty to disclose are not relevant to our consideration.

The tort of civil conspiracy is "'a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.'" *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St. 3d 415, 419, 650 N.E.2d 863, 866, quoting *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St. 3d 121, 126, 512 N.E.2d 640, 645; *Gosden v. Louis* (1996), 116 Ohio App. 3d 195, 219, 687 N.E.2d 481, 496; *Minarik v. Nagy* (1963), 8 Ohio App. 2d 194, 196, 93 Ohio Law Abs. 166, 168, 26 O.O.2d 359, 360, 193 N.E.2d 280, 281. See 16 American Jurisprudence 2d (1998), Conspiracy, Sections 50-73. For a thorough analysis of the elements of civil conspiracy and an explanation of how the tort subtly differs from the related aiding and abetting theory of liability, see, generally, *Halberstam v. Welch* (C.A.D.C. 1983), 705 F.2d 472.

An underlying unlawful act is required before a civil conspiracy claim can succeed. *Gosden*, 116 Ohio App. 3d at 219, 687 N.E.2d at 496; *Minarik*, 8 Ohio App. 2d at 195, 93 Ohio Law Abs. at 168, 26 O.O.2d at 360, 193 N.E.2d at 281. The malice involved in the tort is "that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another." *Pickle v. Swinehart* (1960), 170 Ohio St. 441, 443, 11 O.O.2d 199,

200, 166 N.E.2d 227, 229; *Gosden*, 116 Ohio App. 3d at 219, 687 N.E.2d at 496.

Fraud is

"'(a) a representation or, where there is a duty to disclose, concealment of a fact,'"

"'(b) which is material to the transaction at hand,'"

"'(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,'"

"'(d) with the intent of misleading another into relying upon it,'"

"'(e) justifiable reliance upon the representation or concealment, and'"

"'(f) a resulting injury proximately caused by the reliance.'" *Cohen v. Lamko, Inc.* (1984), 10 Ohio St. 3d 167, 169, 10 OBR 500, 502, 462 N.E.2d 407, 409, quoting *Friedland v. Lipman* (1980), 68 Ohio App. 2d 255, 22 O.O.3d 422, 429 N.E.2d 456, paragraph one of the syllabus. See, also, *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St. 3d 69, 23 OBR 200, 491 N.E.2d 1101, paragraph two of the syllabus; *Russ v. TRW, Inc.* (1991), 59 Ohio St. 3d 42, 49, 570 N.E.2d 1076, 1083.

The court of appeals found that there was no testimony in the record that would justify a finding that any ITT representative misrepresented a fact material to the loan agreement to Williams, and so proceeded to consider whether ITT representatives had concealed a material fact from Williams under element (a) of *Cohen* set out above. The court of appeals based its reasoning upon the consideration that, although Blair referred Williams to ITT, ITT did an independent evaluation of her creditworthiness before issuing her the loan.

We disagree with this specific part of the court of appeals' analysis. If ITT and Blair did engage in a conspiracy to defraud Williams, as Williams alleged, then, as a consequence of the existence of the conspiracy, the finding could be upheld that ITT representatives engaged in fraud against Williams. In a conspiracy, the acts of coconspirators are attrib-

utable to each other. See Prosser & Keeton on Torts (5 Ed. 1984) 323, Section 46 ("All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's act done for their benefit, are equally liable." [Footnotes omitted.]).

After a comprehensive review of the record, we determine that the jury reasonably determined on the sum total of the evidence presented that the jury reasonably determined on the sum total of the evidence presented that employees of ITT conspired with Blair to defraud Williams, with resulting damages to her. ITT can be held liable for the intentional torts of its employee loan officers committed within the scope of their employment. *Osborne v. Lyles* (1992), 63 Ohio St. 3d 326, 329, 587 N.E.2d 825, 828-829; *Byrd v. Faber* (1991), 57 Ohio St. 3d 56, 58, 565 N.E.2d 584, 587. ITT's role in the conspiracy was to allow Blair to have access to loan money that was necessary to further his fraudulent actions against customers such as Williams. Thus, ITT employees themselves affirmatively committed fraud by the very acts of making the loans to Williams and others.

In particular, the testimony of former ITT branch manager and regional manager Jeffrey Stires supported Williams's claims that ITT employees conspired with Blair. Stires testified that Blair's financial problems were well known among ITT employees a significant time before the loan was made to Williams, and that the term "Blair loan" had developed a specific, highly negative connotation among employees of ITT. In addition, Stires and others testified to the close relationship between Blair and ITT's employees.

Because we find that the record provides ample support for the jury's verdict, we disagree with the court of appeals' discussion regarding ITT's violation of a duty to disclose relevant information to Williams. The imposition of liability on ITT on a civil conspiracy theory of recovery is sustainable without a need to rely on the analysis set forth by the court of appeals. We therefore do not address the specific arguments made by ITT and *amici curiae* on the ramifications of the

court of appeals' holding on the disclosure issue, and sustain the jury's verdict that ITT and Blair conspired to commit a fraud that damaged Williams.

III

Punitive Damages

ITT challenges the award of punitive damages against it on several fronts. ITT claims that it should not be derivatively liable for punitive damages based on Blair's violations of the CSPA and HSAA. ITT also argues that punitive damages should never have been awarded based on any of the other theories presented at trial, or based on a violation of the duty to disclose which the court of appeals relied on in upholding compensatory damages based on civil conspiracy. Furthermore, ITT argues that the amount of punitive damages awarded was grossly excessive.

A. CSPA/HSSA liability as support for punitive damages

In the trial court and in the court of appeals, ITT argued that, because it is a dealer in intangibles, its loan contract with Williams was not a "consumer transaction" per R.C. 1345.01, so that the CSPA, R.C. 1345.01 *et seq.*, did not apply to it. See, also, R.C. 5725.01. ITT also argued that the HSSA, R.C. 1345.21 *et seq.*, did not apply. Williams opposed ITT's claims in this regard by arguing that ITT did more than merely make an arm's-length loan to Williams. Williams contended that ITT was sufficiently intertwined with Blair in dealing with Williams that ITT, by virtue of its relationship with Blair, could be found liable under the CSPA and HSSA.

The court of appeals found no need to address ITT's arguments on the grounds raised by ITT, determining that due to the Federal Trade Commission's "holder rule" set forth in Section 433.2(a), Title 16, C.F.R., Williams could sue ITT derivatively for Blair's violations of the CSPA and HSSA. In this situation, ITT is being held accountable not as a financial institution, but instead as a holder of a consumer credit contract. See *Milchen v. Bob Morris Pontiac-GMC Truck* (1996), 113 Ohio App. 3d 190, 195, 680 N.E.2d 698, 701-702 (because the consumer is blameless when the seller fails

to deliver the promised performance of goods or services purchased on credit, the Federal Trade Commission believed it was equitable to reallocate the cost of seller misconduct from the debtor to the creditor); *Ambre v. Joe Madden Ford* (N.D. Ill. 1995), 881 F. Supp. 1182, 1184-1185.

The document signed by Williams to acquire the loan from ITT included the following language, pursuant to Section 433.2(a), Title 16, C.F.R.:

"NOTICE"

"ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

As we understand ITT's third proposition of law, ITT no longer argues that it was improperly subjected to liability under the CSPA and HSSA. ITT now argues that it could not be found derivatively liable for punitive damages based on the CSPA and HSSA, but at most could be found liable only for Williams's actual damages caused by Blair, with those damages limited to an absolute maximum of the "amounts paid by the debtor" thereunder—the $11,500 Williams paid to Blair for the work never completed. ITT contends that the court of appeals was mistaken in utilizing the "FTC holder rule" to sustain the punitive damages award. In support, ITT cites *Hardeman v. Wheels, Inc.* (1988), 56 Ohio App. 3d 142, 565 N.E.2d 849, in which the court found that, because liability imposed derivatively against a lender under the FTC holder rule is not based on the lender's own misconduct, and because punitive damages are assessed to punish conscious wrongdoing, an award of treble damages under R.C. 1345.09 against a culpable party may not be imposed derivatively under Section 433.2, Title 16, C.F.R.

We disagree with ITT's interpretation that the court of appeals sustained the punitive damages award based on ITT's derivative liability under the CSPA and HSSA. Rather,

our reading of the court of appeals' opinion convinces us that the court of appeals sustained the punitive damages award based on a civil conspiracy between Blair and ITT to defraud Williams. We concur in the determination of the court of appeals that the award is sustainable on that basis, and therefore, we find no merit in ITT's third proposition of law.

B. Other support for punitive damages award

As one part of its second proposition of law, ITT argues that it is unfair to subject it to liability for punitive damages when the court of appeals upheld the punitive damages based upon ITT's violation of a duty to disclose that was only first recognized in the court of appeals' opinion. The further argument made by ITT is that ITT should not have been found liable for punitive damages on a theory of liability never submitted to the jury. As we have explained above, we disagree with the court of appeals' conclusion that ITT's violation of a duty to disclose was the basis for upholding liability against ITT for civil conspiracy. Therefore, we determine that ITT was not found liable for punitive damages based on the violation of an unanticipated duty to disclose, and that ITT was found liable based on a theory submitted to the jury. We do not further address ITT's argument in this regard.

ITT also challenges the award of punitive damages by reiterating one of its earlier arguments opposing the imposition of liability for compensatory damages in this case, which is that the case went to the jury primarily on Williams's claim that Blair was an agent of ITT, so that the jury awarded punitive damages against ITT primarily for actions attributable solely to Blair. As explained above, we agree with the court of appeals' ultimate conclusion that, even though Blair was not ITT's agent, the jury's finding that ITT was liable for compensatory damages should be upheld due to ITT's role in a civil conspiracy against Blair. For the same reasons that compensatory damages are supportable against ITT, punitive damages are also supported.

C. Excessiveness of punitive damages award

As another component of its second proposition of law, ITT, citing *BMW of N. Am., Inc. v. Gore* (1996), 517 U.S.

559, 116 S. Ct. 1589, 134 L. Ed. 2d 809, contends that the punitive damage award of $1.5 million is grossly excessive. In *BMW*, the United States Supreme Court found that a $2 million punitive damages award was sufficiently excessive under the facts of that case that the award violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In *BMW*, the court followed three guideposts, or indicia, of excessiveness to evaluate whether the punitive damages award violated due process. The three indicia are (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the harm or potential harm to the plaintiff and the amount of the punitive damages, and (3) the difference between the amount of punitive damages awarded and the civil or criminal sanctions available to be imposed for similar misconduct. See 517 U.S. at 574-575, 116 S. Ct. at 1598-1599, 134 L. Ed. 2d at 826.

We observe that the court in *BMW* appeared to tailor its decision very much to the specific facts of that case, with the three guideposts followed because they lent themselves well to the facts at hand. The court appeared to reject a categorical approach, with the result that the list of guideposts probably is not exhaustive, so that other factors likely will be relevant in the appropriate case. Furthermore, it would appear that when one of the guideposts is particularly relevant, a lesser reliance on the other guideposts may be justified. We question whether most defendants who challenge punitive damages based on the indicia discussed in *BMW* will be successful, given the statement in the concurring opinion in *BMW* to the effect that that justice viewed *BMW* as an "unusual case" in which the facts justified a conclusion that the punitive damages violated due process sufficient to overcome the "strong presumption of validity" attaching when a punitive damages award is not suspect on other grounds. *BMW*, 517 U.S. at 597, 116 S. Ct. at 1609, 134 L. Ed. 2d at 840 (Breyer, J., joined by O'Connor and Souter, JJ., concurring).

The court of appeals below analyzed the punitive damages award under the *BMW* guideposts, found that the amount

awarded was not so excessive as to violate due process, and deferred to the judgment of the jury.

We generally agree with the court of appeals' consideration of the *BMW* factors here, and we likewise determine that the punitive damages awarded did not violate due process. We observe that there is ample evidence in the record that ITT engaged in wrongful conduct sufficient to merit an award of punitive damages. Furthermore, as the jury's responses to the interrogatories (along with the size of the punitive damages award) conclusively indicate, the jury accepted Williams's position on the key questions of fact, and rejected ITT's position. Thus, we must agree with the court of appeals that the jury's verdict is entitled to deference. Because the jury found ITT's conduct to be sufficiently reprehensible, consideration of the first guidepost of *BMW* yields the conclusion that due process was not violated in this case. Likewise, consideration of the other two guideposts also results in the conclusion that due process was not violated.

"The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638, 651, 635 N.E.2d 331, 343; see, also, *Preston v. Murty* (1987), 32 Ohio St. 3d 334, 512 N.E.2d 1174. The amount of punitive damages awarded may be excessive when it is determined to have been the product of passion and prejudice. See *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St. 3d 36, 39, 543 N.E.2d 464, 468. If the punitive damages award is not the result of passion and prejudice, and not the result of legal error, it is generally not within the province of a reviewing court to substitute its view for that of the jury. See *id.* at 40, 543 N.E.2d at 469. See, also, *id.* at 43-44, 543 N.E.2d at 471-472 (H. Brown, J., concurring). Since the punitive damages awarded in this case were not the result of passion and prejudice, and not the result of legal error, we uphold the jury's punitive damage award.

IV

Conclusion

In conclusion, we find that this case properly proceeded to trial, that ITT was properly found liable for its part in an al-

leged civil conspiracy against Williams, and that the amount of punitive damages awarded is not so excessive as to violate due process based on all the facts and circumstances in the record. The judgment of the court of appeals is affirmed.

Judgment affirmed.

DOUGLAS, F.E. SWEENEY and PFEIFER, JJ., concur.

MOYER, C.J., and COOK, J., concur in part and dissent in part.

LUNDBERG STRATTON, J., concurs in part and dissents in part.

COOK, J., concurring in part and dissenting in part. I agree with the majority that Williams minimally supported her civil conspiracy claim at trial and that the jury's finding of liability against ITT on that issue should stand. Based on the state of the record in this case, however, I cannot agree with the majority on the arbitration issue or with its analysis of the punitive damages issue.

Arbitration

I respectfully disagree with the majority's conclusion regarding the conscionability of the arbitration clause. Until today's decision, no court has found the arbitration clause between ITT and Williams to be unconscionable. As acknowledged by both the majority and the appellate court in this case, the trial court never resolved the issue of whether the arbitration clause was valid, much less whether the arbitration clause was unconscionable. The reason for the lack of such a finding is that the parties never litigated this issue due to the odd procedural history of this case. The plaintiff never sought to prove the arbitration clause unconscionable; she thought she had prevailed on that issue.

Much of the majority's unconscionability analysis focuses on analogies between this case and *Patterson v. ITT Consumer Fin. Corp.* (Cal. App. 1993), 14 Cal. App. 4th 1659, 18 Cal. Rptr. 2d 563--a case where a California appellate court found a similar agreement to arbitrate disputes between

a plaintiff and ITT before the National Arbitration Forum ("NAF") unconscionable. There are several reasons, however, to distinguish *Patterson* and enforce the arbitration provision in this case.

As evidenced by R.C. Chapter 2711, there exists a strong legislative policy in Ohio favoring arbitration. The same policy preference is stated in federal arbitration laws, which were specifically incorporated into the contract between Williams and ITT by reference. Section 2, Title 9, U.S. Code. Furthermore, the General Assembly has done nothing to limit that policy preference to commercial transactions. See R.C. Chapters 1321, 1322, 1345 and 1349.

Though state and federal legislation favors enforcement of agreements to arbitrate, both R.C. 2711.01(A) and Section 2, Title 9, U.S. Code permit a court to invalidate an arbitration agreement on equitable or legal grounds that would cause any agreement to be revocable. One such ground is unconscionability. "'Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' *Williams v. Walker-Thomas Furniture Co.* (C.A.D.C. 1965), 350 F.2d 445, 449." *Lake Ridge Academy v. Carney* (1993), 66 Ohio St. 3d 376, 383, 613 N.E.2d 183, 189. Accordingly, unconscionability has two prongs: a procedural prong, dealing with the parties' relation and the making of the contract, and a substantive prong, dealing with the terms of the contract itself. Both prongs must be met to invalidate an arbitration provision.

In explaining the analogies between this case and *Patterson*, the majority appears to stress the disparity of bargaining power between the parties and arbitration costs as reasons for nullifying the agreement to arbitrate as unconscionable. These factors, however, if by themselves deemed to render arbitration provisions of a contract unconscionable, could potentially invalidate a large percentage of arbitration agreements in consumer transactions.

The disparity of bargaining power between Williams and ITT would be one factor tending to prove that the contract

was procedurally unconscionable. A finding of procedural unconscionability, or that the contract is one of adhesion, however, requires more. "Black's Law Dictionary (5 Ed. 1979) 38, defines a contract of adhesion as a '[s]tandardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. * * *'" *Sekeres v. Arbaugh* (1987), 31 Ohio St. 3d 24, 31, 31 OBR 75, 81, 508 N.E.2d 941, 946-947 (H. Brown, J., dissenting), citing *Wheeler v. St. Joseph Hosp.* (1976), 63 Cal. App. 3d 345, 356, 133 Cal. Rptr. 775, 783; *Std. Oil Co. of California v. Perkins* (C.A.9, 1965), 347 F.2d 379, 383. See, also, *Nottingdale Homeowners' Assn., Inc. v. Darby* (1987), 33 Ohio St. 3d 32, 37, 514 N.E.2d 702, 707, fn. 7.

In the present case, Williams did not demonstrate that she would have been unable to obtain a loan from other sources. In fact, part of her civil conspiracy argument is that ITT targeted her for a loan because of the substantial amount of equity that she had built up in her house.

There is no evidence in the record that the arbitration clause was concealed or misrepresented to Williams. In fact, the record reveals that Williams did read the contract and understood after she read the contract that she had three days to cancel.

Additionally, there are differences between this case and *Patterson* relating to substantive unconscionability. The *Patterson* court remarked that "arbitration per se may be within the reasonable expectations of most consumers," but noted that some of the terms of the particular contract, when combined with the NAF's procedural rules, were oppressive to the consumer. *Patterson v. ITT Consumer Fin. Corp.*, 14 Cal. App. 4th at 1665, 18 Cal. Rptr. 2d at 566. The court concluded that the arbitration clause at issue was worded so that it could mislead a reasonable reader to believe that he or she had in fact agreed to arbitration in Minnesota. That is not true in our case, where the arbitration clause states in bold print:

> "You and ITT Financial Services agree that, other than judicial foreclosures and cancellations regarding real estate security, any dispute, past, present, or future, between us or claim by either against the other or any agent or affiliate of the other, whether related to your loan, products you purchase through ITT Financial Services, or otherwise, shall be resolved by binding arbitration in accordance with the arbitration rules of the National Arbitration Forum, Minneapolis, Minnesota, and judgment upon any award by the arbitrator may be entered in any court having jurisdiction over claims of the amount of the award. We agree that the transactions between us are in interstate commerce and this agreement shall be subject to 9 U.S.C § 1-14, as amended."

In turn, Rule 14 of the NAF Code of Procedure mandates that "All Participatory Hearing Sessions shall be held in the Federal Judicial District where the Arbitration Agreement was executed." Accordingly, there is nothing in the contract language under consideration to lead a reasonable consumer to believe that he or she would have to arbitrate the dispute in Minnesota.

The *Patterson* court also appears to have considered it important that the case was one that involved a small claim, but, because of the arbitration clause, the consumers therein would be forced to spend a minimum of $850 on a dispute over a $2,000 loan. Additionally, part of the *Patterson* court's concern that the likely effect of the NAF procedures would be "to deny a borrower against whom a claim has been brought any opportunity to a hearing, much less a hearing held where the contract was signed, *unless the borrower had considerable legal expertise or the money to hire a lawyer and/or prepay substantial hearing fees*" may relate to the fact that absent the arbitration agreement, a proper venue for the claims involved would have been small claims court. (Emphasis added.) *Id.* at 1666, 18 Cal. Rptr. 2d at 566. Those concerns are not present in this case, where the plaintiff initiated the action seeking substantial compensatory and punitive damages and was at all times represented by an attorney.

Finally, the majority's reference to "evidence regarding the conspiracy between ITT and Blair as a fundamental reason for her entering into the loan agreement in the first place" does not support its conclusion that the case was properly withheld from arbitration. As is apparent from the majority opinion, the unlawful act underlying the civil conspiracy claim was fraud. Moreover, according to the majority, that fraud relates to either Blair's fraudulent inducement of Williams to contract with him for the home repairs or ITT's "acts of making the loans to Williams and others." There is neither evidence nor a finding by any court that ITT fraudulently induced Williams into agreeing to arbitrate her disputes; an issue separate from the fraud issue. Accordingly, those factual issues were proper subjects for arbitration, and did not provide the trial court a reason to withhold the case from arbitration. *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St. 3d 498, 692 N.E.2d 574, syllabus; *Williams v. Aetna Fin. Co.*, (1992), 65 Ohio St. 3d 1203, 602 N.E.2d 246 (Wright, J., dissenting). Labeling acts of fraud as "unconscionable" should not support the circumventing of this court's unanimous decision in *ABM Farms*.

It would be unfortunate if the breadth of today's decision works toward the wholesale invalidation of arbitration clauses in consumer transactions—a policy decision that, if made at all, should be made by the General Assembly.

Punitive Damages

I disagree with the way that the majority analyzes the punitive damages issue, but nevertheless agree with its ultimate conclusion. As recognized by the majority, *BMW of N. Am., Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809, sets out three guideposts for evaluating whether a punitive damages award is grossly excessive and therefore violative of due process. Those guideposts are (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the harm or potential harm suffered by the plaintiffs and their punitive damages award, and (3) the difference between this remedy and the civil or criminal

penalties authorized or imposed in comparable cases. *Id.* at 574-575, 116 S. Ct. at 1598-1599, 134 L. Ed. 2d at 826.

In addressing the first guidepost—the degree of reprehensibility of the defendant's conduct—the majority cites the jury's interrogatories and *the size of the punitive damages award itself* as demonstrating that ITT's conduct was sufficiently reprehensible to justify the large punitive damages award. That reasoning could be said to be circular and begs the true question related to the first BMW guidepost—which is whether, from a legally objective standpoint, the defendant's conduct was so reprehensible that it tends to justify the jury's award.

While Justice Breyer's concurrence in BMW states that a "strong presumption of validity" should attach to a punitive damages award, his concurrence does not support this majority's analysis. *Id.* at 586-587, 116 S. Ct. at 1604, 134 L. Ed. 2d at 833. Justice Breyer's concurrence specifically noted that a jury's punitive damages award should be checked against legal standards "that provide 'reasonable constraints' within which 'discretion is exercised,' that assure 'meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages,' and permit 'appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" *Pacific Mut. Life Ins. Co. v. Haslip* (1991), 499 U.S. 1, 20-21, 111 S. Ct. 1032, 1045, 113 L. Ed. 2d 1, 21-22. See also *id.*, at 18, 111 S. Ct. at 1043, 113 L. Ed. 2d at 20 "('[U]nlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities')." *Id.* at 587, 116 S. Ct. at 1605, 134 L. Ed. 2d at 833-834. Accordingly, it is the court's duty to independently evaluate the jury's award in relation to the BMW guideposts. Deference to the jury's award does not replace the court's independent function in reviewing whether a punitive damages award is violative of due process.

Without explanation, the majority also states that "consideration of the other two [*BMW*] guideposts also re-

sults in a conclusion that due process was not violated." Thus, the majority does not explain its conclusion that a punitive damages award one hundred times the amount of actual damages bears a reasonable relationship to harm that resulted or that was likely to result from ITT's actions. The BMW court found a five-hundred-to-one ratio grossly excessive and further suggested that even a thirty-five-to-one ratio would weigh in favor of finding the punitive damages award grossly excessive. *Id.* at 582, 116 S. Ct. at 1602, 134 L. Ed. 2d at 830, fn.35. The *Haslip* court concluded that a punitive damages award four times the amount of compensatory damages "might be close to the line," but did not "cross the line into the area of constitutional impropriety." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 23-24, 111 S. Ct. at 1045, 113 L. Ed. 2d at 23. And, calculating the potential harm to the victim if the tortious activity had succeeded, the court relied upon a ten-to-one ratio of punitive damages to potential harm in determining that punitive damages were not grossly excessive in *TXO Production Corp. v. Alliance Resources Corp.* (1993), 509 U.S. 443, 462, 113 S. Ct. 2711, 2722, 125 L. Ed. 2d 366, 382. Considering the federal precedent, the second BMW factor would also appear to require deeper due process analysis than is apparent from the majority opinion.

Ultimately, I agree with the majority's conclusion that punitive damages are not so grossly excessive in this case that they violate due process. Relying on circumstances supporting the jury's finding of a civil conspiracy and Ohio's civil and criminal penalties for fraud, I find that this high ratio of actual damages to punitive damages passes constitutional muster. My differences with the majority in interpreting what *BMW* requires are purely theoretical. Nevertheless, I think it important to properly interpret the *BMW* guideposts as set forth by the United States Supreme Court, because our interpretation may make a difference in future cases.

MOYER, C.J., concurs in the foregoing opinion.

LUNDBERG STRATTON, J., concurring in part and dissenting in part. I respectfully dissent from the majority's decision on arbitration and join in Justice Cook's dissenting opinion on the arbitration issue only. However, on all remaining issues, I join the majority.

Mildred WILLIAMS, Plaintiff-Appellee, Cross-Appellant,

v.

ITT FINANCIAL SERVICES, a.k.a. AETNA Finance Company, Defendant-Appellant, Cross-Appellee,

and

Christopher BLAIR, d.b.a. HOMESTEAD CONSTRUCTION CO., Michael BLAIR, d.b.a. HOMESTEAD CONSTRUCTION CO.,

and

Robert HAYNES, d.b.a. HOMESTEAD CONSTRUCTION CO., Defendants.

No. C-960234

Court of Appeals of Ohio, First District, Hamilton County.

June 25, 1997.

Civil Appeal From: Hamilton County Court of Common Pleas Judgment Appealed From is: Affirmed in C-960234; Reversed in Part and Cause Remanded in C-960255

William H. Blessing, Esq., No. 006848, Suite 500, 119 East Court Street, Cincinnati, Ohio 45202 for Plaintiff-Appellee/Cross-Appellant, Dinsmore & Shohl, L.L.P., Mark A. Vander Laan, Esq., No. 0013297, and M. Gabrielle Hils, Esq., No. 0012693, 1900 Chemed Center, 201 East Fifth Street, Cincinnati, Ohio 45202-4797, for Defendant-Appellant/Cross-Appellee.

DECISION.

PAINTER, J. In late November 1989, Chris Blair visited Mildred Williams, the plaintiff-appellee, at her house in Lincoln Heights to solicit home-improvement business. Blair, doing business under the monikers "Modern Window Co." and "Homestead Construction Co.," was just a pitchman, and subcontracted out any work that he procured. He targeted neighborhoods in which homeowners had built up equity in their homes, which would allow them to qualify more easily for home-improvement loans. Williams, then sixty-six years of age, would not let him in her house because she was alone. In early December, Blair returned, and to his good

fortune Williams's grandsons were present and she let Blair in her house.

Williams was an easy sell, as her house badly needed repair; she had decided months before to get it fixed. Her only obstacle was obtaining a loan for the repairs, because she was on a fixed income of $430 per month. Williams also had monthly payments totalling $191.93 for outstanding credit card debts and a small doctor bill. Williams, though, did own her home "free and clear."

Blair wrote up a sales contract to repair Williams's kitchen, bathroom, bedroom, gutters, roof, and porch for $11,500. He told Williams that he would help her obtain financing. Blair talked with Tom Scholl at the Loveland branch of ITT Financial Services ("ITT"), who pre-qualified Williams's loan.

The loan was made in two stages. On December 6, 1989, Blair's employee drove Williams to ITT's Loveland branch to get a loan for the home repair. Williams borrowed $3,769.95. ITT charged her a $150 loan-origination fee and a $5 recording fee. Williams was obligated to repay the remaining $3,619.95 plus interest of 27.4% annually over a four-year period, in regular payments of $125 per month. The loan was secured by Williams's 1980 Buick, a three-year-old television listed with a value of $350, and a six-year-old stereo allegedly worth $300. ITT sold Williams insurance on the household contents--the television and stereo--for $52 annually, and held the title to her Buick. ITT also sold Williams a $6,000 life insurance policy, with ITT named as the first beneficiary, for $112.80 annually. Williams also received a check for $450.15.[1] At the loan closing, Williams signed over the remaining $3,000 to Blair and gave the check to Blair's employee.

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[1] Uncertain what the check was to be used for, Williams asked Scholl, who told her it was for herself to use as she pleased. Williams, apparently thinking the money was pennies from heaven, promptly spent it on herself.

A week later, a different Blair employee brought Williams back to the Loveland branch to get a larger loan. ITT made a loan to Williams in the amount of $12,936.64. ITT charged Williams $1,034.93 for another loan-origination fee and $25 for a commitment letter.[2] ITT then used some of the principal from the loan proceeds to repay Williams's first loan. The loan principal was also used to consolidate and pay off Williams's credit card debt. Williams again signed over the remaining money to Blair, giving it to his employee at the closing.

This new loan was a home-equity loan; ITT took a lien on Williams's house. Williams, therefore, was also charged a total of $417 for the recording fee, title insurance, title search, and appraisal. The loan principal was to be repaid at a rate of 17.81% annually over fifteen years, amounting to $190 per month.

Williams was not the first customer that Blair had brought to ITT for a loan. In early 1988, Blair formed a business relationship with John Grippa, then manager at ITT's Cheviot office. At that time, ITT ran a credit check on Blair and his home-repair business and made him an "approved referral dealer." Blair was thus able to procure financial information from his customers and present it to ITT for consideration.

Tom Scholl worked at the Cheviot office from 1987 to January 1988, and then became manager of ITT's Loveland branch. Scholl became familiar with Blair and the large number of loan applicants he brought to ITT. Feeling pressure to produce loans, Scholl asked Blair to bring loan referrals to him. ITT approved many of Blair's referrals for loans, but refused to make loans to a small number of these applicants.

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[2] Apparently, ITT employees received a $50 bonus for every third conversion of a personal loan to a home-equity loan. Because the issue was not discussed at trial, we do not consider whether such practices, with seeming double-charging of loan-origination fees, are legitimate. We are also not certain to whom the "commitment letter" was addressed, or why it was necessary.

A few months before Blair approached Williams, he began experiencing problems. Blair had "gotten too big, too fast" and could not finish all his jobs. He had a difficult time finding subcontractors. He also underestimated costs for many jobs. Blair's customers began making complaints to him--and about him to ITT. Blair began paying on loans for customers whose work he could not complete. Grippa accepted these payments directly from Blair.

As Blair's predicament worsened, he solicited new customers, such as Williams, and used the funds obtained from these customers to pay off the loans of his older, delinquent customers and to finance repair work for these older jobs. A sort of "home-repair Ponzi scheme" was thus created. Blair testified that ITT knew what he was doing.

Soon after Williams signed the loan money over to Blair, Blair had workers begin the repairs at Williams's house, but the subcontractor never did accomplish much. Two kitchen cabinets, a bathtub, a sink, and a vanity, which was not what Williams had chosen, were installed. Blair never finished the work at Williams's house, and the limited work accomplished was shoddy. Meanwhile, Blair's attempt at financing prior jobs with money from new customers got "out of control," and Blair later went bankrupt.

Williams, who had made two loan payments, stopped making payments to ITT on her loan after Blair stopped work. She then sued ITT and the owners of Homestead Construction Co., including Chris Blair. Williams claimed that Blair was ITT's agent, and therefore that ITT was liable for Blair's fraud. Williams also asserted that ITT and Blair engaged in a civil conspiracy. Williams further asserted claims for violations of Ohio's Consumer Sales Practices Act. ITT counterclaimed that Williams had breached the loan contract by failing to make her payments. Blair and the other owners of Homestead Construction Co. were never served with the lawsuit; Blair testified as a witness for Williams.

ITT moved the trial court to stay the proceedings and to compel arbitration under the arbitration clause in the loan contract. The trial court denied the motion. After an appeal

to this court on the arbitration issue, and a subsequent appeal to the Ohio Supreme Court, the trial court again denied ITT's request for arbitration, and the case proceeded to trial. After a seven-day trial, the jury awarded Williams $15,000 in compensatory damages and $1.5 million in punitive damages, as well as attorney fees. The jury found that (1) ITT had committed a fraud on Williams and that ITT had engaged in a civil conspiracy with Blair; (2) ITT violated the Consumer Sales Practices Act; and (3) ITT breached a contract with Williams and that Williams did not breach a contract with ITT, but awarded ITT $3,326.04 on its counterclaim--the exact amount that ITT gave Williams to pay off her credit card debt.

ITT, the defendant-appellant, raises eight assignments of error with respect to the proceedings that culminated in the jury's verdict. Williams, as cross-appellant, asserts two assignments.

I. Arbitration

We first address ITT's assertion, in its second assignment of error, that the trial court erred in denying its initial and subsequent applications for an order compelling arbitration and staying all proceedings pending arbitration.

Prior to filing its answer to Williams's complaint, ITT moved to compel arbitration of her claims. The loan agreement between ITT and Williams contained a broad arbitration clause.[3] The trial court, without explanation, denied ITT's motion to stay the proceedings. The trial court did not deny arbitration because the arbitration clause was unconscionable or invalid, or because the contract was unconscionable or invalid--it merely denied arbitration, with no reasons attached. Upon appeal to this court, in case C-900663, this court stated that "because appellee's complaint challenges

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[3] The arbitration clause stated in part: "* * * any dispute, past, present, or future, between us or claim by either against the other or any agent or affiliate of the other, whether related to your loan, products you purchase from or through ITT Financial Services, or otherwise, shall be resolved by binding arbitration * * *."

the existence of a contract between the parties * * *, the arbitration clause in the loan agreement may not be enforced until the question of the existence of the contract is resolved." ITT appealed to the Ohio Supreme Court, which dismissed the appeal. *Williams v. Aetna Finance Co.* (1992), 65 Ohio St. 3d 1203, 602 N.E.2d 246. Unfortunately, the Ohio Supreme Court, like this court, punted on the issue. But a punt may be run back--as this case is now back here.

After the supreme court dismissed the appeal, ITT moved the trial court to hold an evidentiary hearing on the validity of the arbitration clause. The trial court denied this motion, again without explanation. The trial court never resolved the issue of whether the arbitration clause was valid, or whether the contract existed, and the trial judge simply ordered the case to proceed to trial, erroneously assuming that his original decision, whatever it was, had been "upheld," and that the issue of arbitration was somehow no longer viable.

R.C. Chapter 2711 favors the enforcement of arbitration clauses. *Gen. Elec. Supply v. Warden Elec., Inc.* (1988), 38 Ohio St. 3d 378, 528 N.E.2d 195. A strong presumption exists favoring arbitration when the scope of the arbitration clause is examined. *Sumber Co. Pte. Ltd. v. Diversey Corp.* (Feb. 28, 1996), Hamilton App. No. C-950360, unreported. An order to arbitrate a particular dispute should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. *Id.*; *Robinson v. Poole* (Feb. 12, 1997), Hamilton App. No. C-960188, unreported.

Regrettably, the trial court did not conduct an evidentiary hearing to determine whether the dispute should be sent to arbitration. Forced to proceed, the parties engaged in voluminous discovery and a seven-day trial. Forced to trial, ITT irretrievably lost the benefits for which arbitration clauses are imposed in contracts. Arbitration clauses are inserted in contracts to avoid delay inherent in litigation and to reduce the enormous costs of litigation. See *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St. 3d 708, 590 N.E.2d 1242

(plurality).[4] Arbitration also benefits the courts by conserving judicial resources. *Id.* At this point, all of the advantages of arbitration have been eviscerated. ITT and Williams have spent much time, money, and effort in court to resolve this dispute. ITT now urges this court to enforce the arbitration clause. But the interests of arbitration would not be served and, in fact, militate against sending this case back for arbitration and declaring the trial a nullity. Through much time and effort, this case has already been litigated. Starting over in arbitration would be a colossal waste of resources. Arbitration, at this juncture, does not provide a more efficient forum for hearing the dispute.

Moreover, we hold that ITT was not prejudiced by the trial court's refusal to compel arbitration (except for the delay and cost of litigation, which cannot be refunded now). Arbitration is merely a substitute for litigation. ITT got the "real thing." Aside from the costs component, which cannot be remedied, ITT was not materially prejudiced because it had to litigate, rather than arbitrate, the complaint. To hold so would cast doubt on the efficacy of the judicial system. The second assignment is denied.

II. The Jury's Verdict

In ITT's first assignment of error, it asserts that the trial court erred in overruling its motions for summary judgment, directed verdict, and judgment notwithstanding the verdict.[5]

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[4] See, also, *Bellaire City Schools Bd. of Edn. v. Paxton* (1979), 59 Ohio St. 2d 65, 391 N.E.2d 1021; *Allied-Bruce Terminix Cos. v. Dobson* (1995), 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753.

[5] Generally, any error by a trial court in denying a motion for summary judgment is harmless if a subsequent trial on the same issues demonstrates that a genuine issue of material fact existed, supporting a judgment in favor of the party against whom the motion was made. *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St. 3d 150, 642 N.E.2d 615, syllabus. A narrow opening exists for appellate review of the denial of summary judgment after a cause of action has proceeded to a final verdict at trial if the adverse ruling was based on a pure ques-

A motion for summary judgment should be granted if the court, upon viewing the evidence in a light most favorable to the party against whom the motion is made, determines that: (1) there is no genuine issue of material fact; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St. 3d 587, 639 N.E.2d 1189; *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 364 N.E.2d 267. The standard of review when considering motions for directed verdict and for judgment notwithstanding the verdict is virtually the same. *Howell v. Dayton Power & Light Co.* (1995), 102 Ohio App. 3d 6, 656 N.E.2d 957. For each, the evidence is construed most strongly in favor of the party against whom the motion is directed, and the motion must be overruled unless, after construing the evidence, reasonable minds could reach no other conclusion but that, under the applicable law, the movant is entitled to a judgment in his favor. *Nickell v. Gonzalez* (1985), 17 Ohio St. 3d 136, 477 N.E.2d 1145.[6]

ITT premises this assignment on its claim that Blair was not the agent of ITT, and therefore posits that the trial court erred in not entering judgment in favor of ITT on the claims for fraud, committed by Blair as ITT's agent, and for civil conspiracy. We agree with ITT that the trial court should have held, as a matter of law, that Blair was not in an agency relationship with ITT that could have imposed liability upon ITT for fraud committed by Blair. However, the lack of an agency relationship would not have affected Williams's right

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tion of law. *Donovan v. Omega World Travel, Inc.* (Oct. 5, 1995), Cuyahoga App. No. 68251, unreported.

[6] See, also, *Universal Windows v. Eagle Window & Door, Inc.* (Dec. 11, 1996), Hamilton App. No. C-950669, unreported; *Cardinal v. Family Foot Care Ctrs., Inc.* (1987), 40 Ohio App. 3d 181, 532 N.E.2d 162.

to bring a civil conspiracy claim against ITT, considering its relationship with Blair.

A. Agency Law

"The relationship of principal and agent * * * exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks." *Hanson v. Kynast* (1986), 24 Ohio St. 3d 171, 494 N.E.2d 1091, syllabus. The evidence adduced at trial showed that Blair, at most, was a limited or special agent only acting as a loan-referral source. Williams's witnesses--Blair, Scholl, and Jeffrey Stires, an ITT regional manager--testified that Blair was not an ITT employee or an agent of ITT with respect to approving loans. Blair had no power to bind ITT to a loan agreement. Blair only was a "birddog," bringing potential customers to ITT. ITT would then scrutinize each applicant, with no input from Blair. Once a loan was referred by Blair to ITT, he was no longer a part of the process. Blair and Scholl testified that some of Blair's loans were rejected for not meeting ITT's lending criteria. Blair did not receive any monetary incentive for referring loans--his obvious incentive was to help his customers find financing to fund his projects.

Further, ITT never held Blair out as its agent. The apparent power of an agent is determined from the acts of the principal and not by acts of the agent. *Master Consolidated Corp. v. BancOhio Natl. Bank* (1991), 61 Ohio St. 3d 570, 575 N.E.2d 817, syllabus. The evidence failed to show that ITT gave the impression that Blair had the authority to make loans for ITT. Blair possessed no "apparent authority" granted by ITT.

ITT never gave Blair express authority to make loans for ITT, nor did it create the impression that Blair had the apparent authority to make loans for ITT. A principal is jointly and severally liable for the fraudulent representations and nondisclosure of its agent. See, *e.g.*, *DeSantis v. Smedley* (1986), 34 Ohio App. 3d 218, 517 N.E.2d 1038. But Blair was not ITT's agent with respect to approving the loans that ITT made to Williams. ITT, therefore, cannot be held liable for its actions as a lender under an agency theory.

Because Blair was not acting as ITT's agent for approving loans, any fraud committed by Blair cannot be imputed to ITT on a theory of vicarious liability of a principal for an agent's acts. Any fraud that Blair perpetrated on Williams was outside the scope of authority granted to Blair by ITT. Blair was not an agent for ITT with the authority to approve loan applications, and therefore ITT is shielded from liability under an agency theory. However, because the jury found ITT liable under theories of agency and civil conspiracy, we must examine whether the jury could have properly entered judgment for Williams under a civil conspiracy theory.

B. Civil Conspiracy

In its first assignment of error, ITT also argues that the verdict was against the manifest weight of the evidence. We must reject ITT's assignment claiming that the trial court erred in denying its motions for summary judgment, directed verdict, and judgment notwithstanding the verdict if we determine that the jury's verdict for Williams on the civil conspiracy charge was not against the manifest weight of the evidence. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St. 2d 279, 376 N.E.2d 578, syllabus; *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St. 3d 223, 638 N.E.2d 533. Great deference must be given to the verdict of a jury, and a court of appeals must be guided by a presumption that the findings of the trier of fact were correct. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77, 461 N.E.2d 1273.

"Civil conspiracy," recognized in Ohio's common law, is defined as "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St. 3d 415, 419, 650 N.E.2d 863, 866-867, quoting *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St. 3d 121, 126, 512 N.E.2d 640, 645, citing *Minarik v. Nagy* (1963), 8 Ohio App. 2d 194, 196, 193 N.E.2d 280, 281. However, a conspiracy

between two or more persons to injure another is not enough; an underlying unlawful act is necessary to prevail on a civil conspiracy claim. See *Gosden v. Louis* (Dec. 4, 1996), Summit App. No. 17609, unreported; *Stiles v. Chrysler Motor Corp.* (1993), 89 Ohio App. 3d 256, 624 N.E.2d 238; Minarik v. Nagy. The underlying unlawful act must be made in furtherance of the conspiracy. See *Gosden v. Louis*.

The "malice" in "malicious combination" necessary in a civil conspiracy claim is legal or implied malice, "which the law infers from or imputes to certain acts, and is defined as that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another." *Gosden v. Louis*, citing *Pickle v. Swinehart* (1960), 170 Ohio St. 441, 166 N.E.2d 227. Malice, inferred from the design of two persons to cause harm by means of an underlying tort, need not be proven separately or expressly. *Gosden v. Louis*. Damages, though, must be caused by a tort committed in furtherance of the conspiracy.

In essence, a civil conspiracy claim enlarges the pool of potential defendants from whom a plaintiff may recover for an underlying tort. *Gosden v. Louis*, citing *Minarik v. Nagy*, 8 Ohio App. 2d at 195, 193 N.E.2d at 281. Therefore, Williams could prevail on a claim of civil conspiracy against ITT if she showed at trial that ITT engaged in a malicious combination with Blair for the purpose of committing fraud on Williams, in a way not competent for one alone, with damages to Williams from the fraud.

C. Fraudulent Concealment and the Duty to Disclose

Fraud is defined as "(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Cohen v. Lamko, Inc.* (1984), 10 Ohio St. 3d 167, 169, 462 N.E.2d 407, 409, quoting *Friedland v. Lipman* (1980), 68 Ohio App. 2d 255, 429 N.E.2d 456; see, also,

Russ v. TRW, Inc. (1991), 59 Ohio St. 3d 42, 570 N.E.2d 1076.

We have scoured the record to determine whether competent, credible evidence was adduced at trial to uphold the jury's verdict for Williams based on a civil conspiracy claim, premised on fraud committed by ITT in combination with Blair. We hold that enough evidence was presented at trial to sustain the jury's verdict.

The key to our inquiry of whether a fraud was perpetrated on Williams by ITT and Blair focuses on the relationships of the parties. Simply, Blair entered into a home-repair contract with Williams. Blair referred Williams to ITT for a loan. We have held that Blair did not have actual or apparent authority to approve the loan for Williams; ITT independently examined credit applications. Williams and ITT then entered into a loan contract which funded the home-repair contract.

As a lender, ITT could be liable for fraud if it misrepresented to Williams, with knowledge or recklessness, a fact material to the loan contract. However, there is no testimony in the record that an ITT representative misrepresented any facts material to the loan contract. This notwithstanding, ITT could be liable for fraudulent concealment, if it had a duty to speak but failed to disclose facts material to the making of the loan. See *Stolte v. Minster State Bank* (Nov. 5, 1992), Auglaize App. No. 2-92-4, unreported.

We now delve into an analysis of when a lender has a duty to disclose information, which is pertinent to the making of a loan, to its customer. Holding a lender liable for the actions of third parties creates a slippery slope. We are careful to tread lightly, because we fear this opinion may be read too broadly as placing lenders in the position of investigators or insurers of third parties who are the known, ultimate receivers of loan proceeds. But surely a lender has no duty to investigate the party to whom its customer disburses the loan proceeds. And a lender generally has no duty to disclose the information that it does possess concerning the third party to whom the customer disburses loan proceeds. See *Stolte v. Minster State Bank*. The duty of investigation remains on the

borrower, who independently must ascertain the viability of the party with whom it contracts for goods or services. However, when a fiduciary duty is established between a lender and its customer, or certain special circumstances arise, a lender may have a duty to disclose (a) material information within its particular knowledge concerning the third party receiving the loan proceeds, or (b) facts pertinent to the loan transaction. And confidentiality may be a concern for banks, especially when the third party receiving the loan proceeds is itself a customer of the lender, although we need not address that issue here.[7]

The relationship of debtor and creditor, without more, is not a fiduciary relationship, and therefore a bank and its customers stand at arms' length in negotiating terms and conditions of a loan. See *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St. 3d 98, 519 N.E.2d 363. Though ITT is not a bank, its status as a purchase-money creditor is sufficiently analogous for our purposes. Thus, usually without such an express fiduciary relationship, ITT would have been under no legal duty to disclose to Williams material facts that may have caused her not to do business with Blair. Additionally, "[a] fiduciary relationship may be created out of an informal relationship, but this is done only when both parties understand that a special trust or confidence has been reposed." *Schory & Sons, Inc. v. Francis* (1996), 75 Ohio St. 3d 433, 442, 662 N.E.2d 1074, 1081, quoting *Umbaugh Pole Bldg. Co. v. Scott* (1979), 58 Ohio St. 2d 282, 390 N.E.2d 320, paragraph one of the syllabus.

In *Umbaugh*, the bank gave advice to the Scotts concerning their farming business, including suggesting to the Scotts that they liquidate some assets to make payments on their home and maintain a smaller farming operation. Later, the

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[7] See, *e.g.*, *Richfield Bank and Trust Co. v. Sjogren* (Minn. 1976), 309 Minn. 362, 244 N.W.2d 648; *Boubelik v. Liberty State Bank* (Minn. 1996), 553 N.W.2d 393; *Barnett Bank of West Florida v. Hooper* (Fla. 1986), 498 So.2d 923; *R.A. Peck, Inc. v. Liberty Fed. Sav. Bank* (N.M. App. 1988), 108 N.M. 84, 766 P.2d 928.

lender advised the Scotts to sell their farm equipment and hogs covered by the security agreement. The Ohio Supreme Court held that this advice, given by an institutional lender in a commercial context in which the parties dealt at arms' length, was insufficient to create a fiduciary relationship. No evidence was presented that showed that the Scotts had reposed a special trust or confidence in the bank, in an expectation that the bank, or its representative, was acting in the Scotts' best interest, rather than in the bank's best interest. But where such a special trust and confidence is reposed, a de facto fiduciary relationship arises. See *Applegate v. Fund for Constitutional Govt.* (1990), 70 Ohio App. 3d 813, 592 N.E.2d 878.

From the testimony in the record, it is clear that Williams never reposed a special trust or confidence in ITT. ITT merely processed her loan application, showed her where to sign, and told her she could sign the check over to Blair's representative, who was present at the closing. Williams presented no evidence that she relied on a special trust she had in ITT. The loan contract was based on an arms' length transaction; no fiduciary relationship existed that would create a duty to disclose facts material to the consummation of the loan. Therefore, ITT had no fiduciary duty to tell Williams about its relationship with Blair, or to provide any information that it possessed about Blair's business. ITT did not have a fiduciary duty to inform Williams that Blair had referred many loans to it before, that complaints had been received concerning Blair's incomplete work, or that ITT was aware that Blair was making payments on behalf of ITT customers, referred by Blair, for whom Blair was behind schedule in completing work. In fact, ". . . absent an understanding by both parties that a special trust and confidence has been reposed in the creditor, the creditor has no duty to disclose to the consumer the existence and details of a finder's fee or similar arrangement with a credit arranger." *Blon* at paragraph two of the syllabus. Thus, although ITT would have had no duty to disclose to Williams any finder's fee it paid to Blair for referring her loan to ITT, the testimony establishes that Blair received no type of finder's fee for his referrals.

But even without an express or de facto fiduciary relationship, case law in other jurisdictions supports the imposition of a duty to disclose material facts known to a lender under special circumstances. Examining cases with facts similar to those sub judice, we hold that special circumstances may necessitate a duty to speak.

In *Richfield Bank & Trust Co. v. Sjogren* (Minn. 1976), 309 Minn. 362, 244 N.W.2d 648, the Sjogrens executed a promissory note in favor of the bank for purchasing fifty commercial air-purification units from National Pollution Eliminators ("NPE"). The loan officer at the bank was intimately involved with NPE. He handled all of NPE's accounts at the bank, was listed by NPE as its credit reference to customers, received benefits from NPE, such as use of a Cadillac, and was an active participant in the affairs and decisions of NPE. The loan officer failed to tell the Sjogrens when processing their loan, which he knew was to purchase the air purifiers, that (1) NPE was placed on a "cash only" basis by its supplier of component parts, (2) the company had virtually ceased production of the units because of this fact, (3) the production force was down to one or two people, and (4) there were no more than ten units in inventory.

Deciding if the bank had a duty to disclose NPE's shortcomings, the Minnesota Supreme Court posited that the determinative question was whether the loan officer knew that NPE was so "irretrievably insolvent" that it had no reasonable expectation of fulfilling its contractual obligation of supplying air purifiers to the Sjogrens. The court distinguished "irretrievable insolvency" with insolvency that could be remedied. If the insolvency was merely temporary, or capable of being remedied, the bank would have no duty to disclose that condition to a potential borrower. The court held that under the special circumstances of the case--the bank's actual knowledge of the fraudulent activities of NPE--the bank had an affirmative duty to disclose those facts to the Sjogrens before it made the loan that furthered the fraud.

The Minnesota Supreme Court was recently confronted with a similar issue in *Boubelik v. Liberty State Bank* (Minn. 1996), 553 N.W.2d 393. Boubelik, a senior vice-president at

National Car Rental, and William Baker, an attorney, obtained a loan from Liberty State Bank to open a bar to be run by Baker's brother Joseph, who owned and operated other bars. Joseph conducted his business and personal banking at Liberty, dealing mostly with loan officer John Wittek. Joseph had a line of credit at the bank for a separate venture called Old Library Restaurants. Essentially, Joseph used the loan proceeds obtained from his brother and Boubelik to pay down debts of Old Library Restaurants. Joseph then went bankrupt. Wittek knew that Boubelik and Baker wanted the loan proceeds to be used for the new bar. He also knew that Joseph wanted to use some of these proceeds to cover Old Library Restaurants' debts. But Wittek did not tell Boubelik or Baker that the funds would be used in this way.

The court determined that Boubelik and Baker, both educated and familiar with commercial transactions, possessed the ability to obtain the material facts that Wittek failed to disclose to them. Neither asked Joseph how he was going to use the funds, or investigated where the money was going. "Because Liberty did not have special knowledge of material facts to which Boubelik and William Baker did not have access, Liberty had no duty to disclose the information plaintiffs recite." *Id.* at 400. The court then, to ensure that banks had a clear standard to follow regarding their duty to disclose, reiterated the bright-line standard of "irretrievable insolvency" that would activate a duty to disclose. The court determined that Joseph was not irretrievably insolvent at the time Liberty made the loan to Boubelik and Baker, evidenced by the fact that Liberty, and another bank, made further loans to Joseph, indicating that Liberty truly believed Joseph was not irretrievably insolvent. Further, Joseph continued his business ventures for another seventeen months after the loan to Boubelik and Baker was made.

The relationships between Blair, ITT, and Williams are similar to those in the Minnesota cases. We look for special circumstances that would impose a duty to disclose on ITT, even in the absence of a fiduciary relationship with Williams.

In early December 1990, when Williams applied for, and received, the loan from ITT, ITT realized that Blair was in

financial difficulty. However, Blair, from ITT's perspective, was not irretrievably insolvent. Blair did not declare bankruptcy until April 1991. He continued to refer loans, which were granted, to ITT after the loan was made to Williams. Blair even did some work on Williams's house after the loan was made, and testified that at the time he fully intended to perform the work. Although ITT personnel testified that they knew Blair was encountering financial difficulty near the time Williams procured her loan, the testimony does not establish that ITT knew Blair was "irretrievably insolvent." The evidence, in fact, tends to show that Blair was struggling to remain in the home-repair business.

However, the bright-line standard of "irretrievable insolvency" is not the only special circumstance that may require disclosure by ITT. In contrast to the plaintiffs in *Boubelik*, Williams was relatively uneducated and inexperienced in commercial transactions. She did not have the ability to discover that Blair was not performing other work and was making payments to ITT on those customers' loans. Williams did not have the ability to discover that Blair was using loan proceeds from new customers to finance repairs for other customers. Even had she asked Blair if he were doing this, it is incredible that he would have told her the truth.

Justice Gardebring, writing the dissent in *Boubelik*, joined by Justice Page, argued that the majority distorted the holding in *Richfield Bank & Trust Co.* by mandating disclosure only when the lender is aware of fraud perpetrated by virtue of the financial condition of the third party who receives the loan proceeds. Justice Gardebring asked: ". . . why is a consumer protected against one type of fraud and not another, when the knowledge to prevent each is within the grasp of the bank and, in each case, unknown to its customer?" *Id.* at 404. We agree with this analysis and supplant Ohio common law with a rule with roots in our sister state.[8] We hold that

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[8] See, also, *Merrill Lynch v. First Natl. Bank of Little Rock* (C.A.8, 1985), 774 F.2d 909; *Barnett Bank of West Florida v. Hooper* (Fla. 1986), 498 So.2d 923; *R.A. Peck, Inc. v. Liberty Fed. Sav. Bank* (N.M.

disclosure is compulsory when a lender knows of fraud being perpetrated on one of its unsophisticated customers in a loan transaction, and that the making of the loan would further the fraud.[9]

From the morass of testimony at trial, the jury reasonably could have determined that ITT had knowledge that Blair was perpetrating a fraud on Williams. Although Blair was not irretrievably insolvent at the time ITT made the loan to Williams, Blair was using loan proceeds from new customers to finance ongoing repair jobs and to make payments on loans for jobs he was not performing. Common-law conversion involves the wrongful exercise of dominion over the property of others in exclusion of their rights, or a withholding from their possession under a claim inconsistent with their rights. *Blon v. Bank One, Akron, N.A.*, 35 Ohio St. 3d at 103, 519 N.E.2d at 369, citing *Railroad Co. v. O'Donnell* (1892), 49 Ohio St. 489, 32 N.E. 476. The jury was free to rely on Blair's testimony that ITT knew that he was converting these funds. ITT failed to disclose this vital information to Williams and furthered the fraud that Blair committed on Williams.

Blair's testimony that ITT knew about this fraudulent use of his new customers' loan proceeds is supported by the testimony of ITT employees, which reflect impropriety in the relationship between Blair and ITT. Blair had developed working relationships at ITT with both Grippa, beginning in 1988, and Scholl, who personally made the loan to Williams. Grippa was Blair's usual contact at ITT. It was customary for Blair to attend the closing with the customer--although this practice was contrary to ITT policy.

App. 1988), 108 N.M. 84, 766 P.2d 928; *Jeminson v. Montgomery Real Estate & Co.* (Mich. 1976), 396 Mich. 106, 240 N.W.2d 205.

[9] Again, we do not address any confidentiality concerns that a bank or lender may have due to its relationship with a customer.

The regional manager of ITT, Jeffrey Stires, realized there was a problem with loans referred by Blair in November 1989. In fact, some employees at ITT told him that Grippa did improper financing for Blair and would process loans for Blair that would not be approved at a different ITT branch. Stires spoke with Frank Johnson, manager of ITT's Delhi branch, about Blair not completing work, Blair making payments on customers' loans, and Grippa improperly collecting these payments. Stires also talked with his superior Ron Collins, before December 1989, about Blair making payments on loans because he had not completed the work for his customers.

Donna Renaker, assistant manager of the Delhi branch, told Stires that she was "job-scared" because she felt pressure to make loans to Blair, but that she feared that her loan-delinquency rate would rise because she knew Blair was not completing work. After speaking with Stires, Renaker refused to make loans to Blair; instead, Grippa sent the loans to different branches.

The jury also heard from Christina Jackson of one incident in particular, which corroborated the assertion that Blair was intimately entangled with ITT. Jackson, using common sense, only gave Blair part of her loan proceeds up front, and promised the remainder upon Blair's completion of the repairs. ITT told Jackson that it would keep the rest of the loan money, which was in the form of a check made out to Jackson, in its safe for her protection. But Jackson later learned that ITT gave Blair the check without her permission.

Albert Brown, an attorney, served a lawsuit on ITT in August 1990 that was nearly identical to Williams's suit. Although ITT claimed that it never received the suit papers, the jury was free to weigh this evidence, which corroborated ITT's knowledge of Blair's fraud.

From the record, we hold that the jury could have reasonably determined that Blair was intimately involved with ITT, and that ITT knew that Blair was converting the funds of his new customers to pay off old jobs.

Upon our determination that ITT had a duty to disclose Blair's illegal use of loan proceeds, it is a simple matter for

us hold that the jury was entitled to find ITT liable for its part in a civil conspiracy. ITT's fraudulent concealment of material information pertinent to the loan transaction, the absence of which was obviously relied upon by Williams in completing the loan process, caused injury to Williams--she did not receive the repairs for which she still owed the money. Williams's reliance, as noted, was justifiable because of her lack of education, sophistication, and experience in loan transactions. This fraud committed by ITT was the underlying tort in the civil conspiracy. And the fraud could only be committed in the context of a conspiracy. ITT could not have committed such a fraudulent act without another party such as Blair converting his customers' funds, which fact ITT should have disclosed to its customers.

III. Jury Instructions

In its third assignment, ITT argues that the trial court erred repeatedly when instructing the jury. ITT first challenges the trial court's jury instructions pertaining to the law of agency. However, because we have determined that the trial court should have held that Blair was not the agent of ITT with authority to approve loans, any error by the trial court when instructing the jury on the law of agency is moot.

ITT next asserts that the trial court erred in failing to give its proposed jury instructions on contract law. ITT claims that the "[p]laintiff's case was premised upon breach of contract; yet, the jury never was told what constituted a breach!" ITT Brief at 27. ITT claims that it was denied its defense in this case because the trial court did not instruct that the case involved two separate contracts, one for home improvement and one for a loan.

But the jury did not need to be instructed that two contracts existed; it could have determined that two contracts existed from the definition of contract provided by the trial court, which was an accurate statement of the law. Further, our understanding is that Williams's case was premised on Blair's involvement with ITT, whether in an agency or civil conspiracy context, not merely on breach of contract.

Whether ITT fully performed the loan agreement is immaterial to these claims.[10] The trial court's refusal to give ITT's proposed jury instructions on the law of contracts was not error.

ITT further asserts that the trial court erred when instructing the jury on punitive damages. ITT claims that the trial court should have instructed the jury that punitive damages could not be awarded unless the fraud was committed with malice. The trial court instructed the jury that either fraud or malice was necessary. ITT also claims that the trial court should have instructed the jury that Williams had the burden of proving the propriety of punitive damages by clear and convincing evidence. The trial court instructed the jury that it could award punitive damages if they were warranted by the greater weight of the evidence.

However, in its proposed jury instructions, ITT did not request that the trial court inform the jury that malice was a necessary element for awarding punitive damages. Nor did ITT request that the trial court instruct the jury concerning the appropriate burden of proof. ITT did not object to the jury instructions when they were given. A jury instruction may not be challenged on appeal unless specific objection is raised prior to deliberations. *Schade v. Carnegie Body Co.* (1982), 70 Ohio St. 2d 207, 436 N.E.2d 1001, paragraph one of the syllabus; Civ. R. 51(A). Thus, ITT waived any right to challenge the appropriateness of the instructions.

A plain-error exception is used in civil cases only under exceptional circumstances to prevent a manifest miscarriage of justice. *Cleveland Elec. Illum. Co. v. Astorhurst Land Co.* (1985), 18 Ohio St. 3d 268, 480 N.E.2d 794. Aggravated or egregious fraud, which is grounds for punitive damages, requires evidence of maliciousness, deliberateness, grossness, or wantonness. *Romp v. Haig* (1995), 110 Ohio

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[10] Although, in Interrogatory 5, the jury explicitly found that ITT breached a contract with Williams, that determination is not material to our discussion because our decision is based on a finding of civil conspiracy by the jury.

App. 3d 643, 645, 675 N.E.2d 10, 11, citing *Logsdon v. Graham Ford Co.* (1978), 54 Ohio St. 2d 336, 376 N.E.2d 1333. In awarding punitive damages, the jury could have reasonably concluded that ITT acted maliciously, deliberately, or wantonly by displaying a conscious disregard for the rights of Williams, and that such disregard had a great probability of causing substantial harm. See *Davis v. Sun Refining & Marketing Co.* (1996), 109 Ohio App. 3d 42, 671 N.E.2d 1049. And considering the abundance of testimony that supported Blair's accusations that ITT knew of all of his actions, we hold that the jury could have found that punitive damages were supported by clear and convincing evidence. See R.C. 2315.21. Exceptional circumstances do not exist that would require this court to hold that the jury instructions were prejudicial to ITT.

Finally, ITT claims that the trial court erred by refusing to instruct the jury that it must find that Williams suffered damages independent of her underlying tort claims before it could make an award for civil conspiracy. ITT obviously misconstrues the tort of civil conspiracy. As explained earlier, civil conspiracy requires proof of injury from an underlying tort--apart from the conspiracy itself--that furthers the conspiracy. See *Gosden v. Louis*. Here, ITT's fraudulent concealment was the underlying tort that caused injury to Williams and furthered the conspiracy. The trial court correctly instructed the jury on civil conspiracy.

The third assignment is overruled in its entirety.

IV. The Remarks of Plaintiff's Counsel

In its sixth assignment, ITT contends that the trial court erred in allowing Williams's attorney to make a myriad of unsubstantiated, prejudicial, and inflammatory remarks during trial over ITT's objections.

During opening and closing arguments, attorneys have wide latitude to present argument explaining their theory of the case, as long as the argument stays within the boundaries of the record. See *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St. 3d 36, 543 N.E.2d 464; *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 84 N.E.2d 912. ITT first contends that Williams's counsel's intimations in opening statement

concerning a cash-payment scheme between Blair and Grippa, with no evidence produced at trial, was so prejudicial that the verdict must be set aside. ITT relies on a portion of the opening statement in which Williams's attorney stated that Blair "* * * transferred cash from his hand to the hands of ITT's regional manager whose name was John Grippa." The record does contain testimony that Blair gave Grippa money to sponsor a baseball team for ITT. This statement was supported by evidence adduced at trial.

ITT next complains about opening and closing statements misrepresenting that ITT was trying to take Williams's house, with no evidence presented at trial for support. However, granting Williams's attorney wide latitude in opening and closing statements, we hold that these comments were illustrative of his theory of the case. Williams's case was predicated on a theory of civil conspiracy, where ITT helped defraud Williams. Williams posited that ITT's motivations were to retain the benefits of Williams's home if she could not repay the loan; if she repaid the loan, ITT would be satisfied with collecting nearly eighteen percent interest on the principal. Jurors should be given credit for common sense and sound judgment. See, e.g., *State v. Woodards* (1966), 6 Ohio St. 2d 14, 215 N.E.2d 568, certiorari denied (1966), 385 U.S. 930, 87 S. Ct. 289, 17 L. Ed. 2d 212. After hearing the evidence, the jury was free to form its conclusions about ITT's motivations for making the loan to Williams.

ITT further complains that Williams's attorney prejudiced ITT by alleging that ITT was engaged in targeting elderly African-Americans in its scheme. Williams introduced testimony from other ITT customers who were elderly African-Americans. The jury was again free to reach its own conclusions on the evidence adduced at trial.

ITT's fourth complaint concerns a story that Williams's attorney told during closing argument about King David. ITT claims that Biblical references mislead a jury into following extrajudicial law from a source other than the judge. However, Williams's attorney never requested, explicitly or implicitly, that the jury follow extrajudicial law. The story was an attempt to analogize ITT's wrongdoing to that of

King David. Analogies, in the form of a story, are not improper even when the Bible is used as a reference.

Finally, ITT asserts that Williams's attorney misrepresented that ITT illegally obtained Williams's credit report, and that the misrepresentation was so prejudicial that the verdict must be set aside. Williams's attorney only asked Scholl if it was legal to get a person's credit report without written authorization. Scholl testified that he thought it was proper. Williams's attorney did not present testimony on the legality of doing a credit check. If ITT were concerned about the question, it could have elicited testimony on the propriety of performing such a credit check. We do not see how this question seriously prejudiced ITT. ITT's argument has no merit.

The sixth assignment is overruled in its entirety.

V. Evidentiary Concerns

In its seventh assignment of error, ITT asserts that the trial court erred in admitting numerous hearsay statements from Williams's witnesses, improper character and habit evidence, and other irrelevant, prejudicial, and inflammatory evidence.

ITT claims that the trial court erred in allowing inflammatory hearsay testimony of an alleged affair involving Grippa and Marcie Minor, an ITT employee. The following exchange occurred when Bethany Crawford, who was an ITT customer-service representative working under Grippa, was questioned on direct examination:

"Q: Wasn't it common knowledge around the office that he was renting an apartment for her nearby?

Defense Counsel: Objection; relevance.

The Court: How is that relevant?

Plaintiff's Counsel: Motivation for her money.

The Court: All right, she may answer.

A: It was common knowledge that something was going on.

Defense Counsel: Objection. Move to strike.

The Court: It will be stricken as to what was common knowledge."

The trial court struck the witness's answer, which may have created an inference of the existence of a relationship unrelated to work. ITT did not request a curative instruction.

Later, when Stires testified, Williams's counsel attempted to broach the subject again:

"Q: And John Grippa worked very closely with a woman named Marcie Miner [sic]; is that correct?

A: They worked together, yes.

Q: And they had a social relationship?

Defense Counsel: I will object your honor [sic].

The Court: Overruled.

Defense Counsel: May we approach?

The Court: Yes."

At sidebar, the trial court informed Williams's counsel to move on to something different, which he did. Stires was never allowed to answer whether Grippa and Minor had a social relationship. The trial court never allowed the issue of the "affair," which allegedly blackened ITT's reputation, to be before the jury.

Further, after closing arguments, the trial court instructed the jury that "[s]tatements or answers that were stricken by the Court or which you were instructed to disregard are not evidence and must be treated as though you never heard them." Juries are presumed to follow the trial court's instructions. See, e.g., *State v. DePew* (1988), 38 Ohio St. 3d 275, 528 N.E.2d 542. ITT's argument centers on testimony that was stricken, and testimony that was never given. This argument is frivolous.

ITT also asserts that the trial court erred in allowing inflammatory, hearsay statements from Stires, who had no personal knowledge concerning the statements. ITT is concerned about statements Stires made regarding Grippa's relationship with Blair. Stires based these statements on conversations he had with employees at ITT. For example, Donna Renaker, an assistant manager at ITT, told Stires that she received pressure from Grippa to make loans to customers whom Blair had solicited. Frank Johnson, who became the manager at the Delhi branch after Grippa left to become

regional manager, and Stires discussed complaints about Blair, that Blair was paying off customers' loans because he was behind schedule, and that Grippa collected these payments for ITT.

Statements from those who are agents or servants, concerning a matter within the scope of their agency or employment, made during the existence of the relationship, are not hearsay. See *Valley Roco Mixing Co. v. Am. Internat'l. Sales & Dev. Co.* (Apr. 21, 1993), Summit App. No. 15832, unreported; Evid. R. 801(D)(2)(d). Stires' testimony was not hearsay because he relayed statements made by ITT employees about Blair and loan transactions involving Blair. These statements, made by managers and assistant managers at ITT, were within the scope of their employment--making loans. These statements constitute an admission of a party opponent.

ITT further claims that the trial court erred in admitting testimony from other ITT customers, such as Christina Jackson, Bessie Allen, Willie Scott, and Fannie Boyd, who had been referred to ITT by Blair. ITT contends that the testimony of these witnesses was inadmissible character and habit evidence under Evid. R. 404(B) and 406. These witnesses obtained their loans at branches other than Loveland, where Williams obtained her loan. They also told different stories about their experiences with ITT and Blair. ITT insists that the testimony of these witnesses was inadmissible because it was introduced to show that ITT acted in conformity with its actions toward these other customers when it acted with regard to Williams.

ITT attempts to convolute the nature of the testimony of these witnesses. Williams introduced these witnesses to show that ITT knew that Blair was not completing work and was paying on customers' loans. The evidence was not admitted to prove ITT's character, but to prove that although ITT had knowledge that Blair was not performing on his contracts, ITT continued to make loans to his customers, including Williams. This evidence was admissible under Evid. R. 404(B). See, e.g., *Ogle v. Kelly* (1993), 90 Ohio App. 3d 392, 629 N.E.2d 495.

ITT next asserts that the trial court erred in allowing hearsay statements of ITT customers who had no knowledge of the identity of the ITT employees with whom they spoke. Although these witnesses could not identify the ITT employees with whom they spoke during instances when they called ITT to complain about Blair, the ITT employees were acting in the scope of their duties for the making and management of loans.

Willie Scott testified to conversations he had with ITT employees concerning his loan. Bessie Allen relayed a conversation she had with an ITT employee who had called her about her delinquent loan; Allen told the employee that Blair was supposed to pay the loan. Fannie Boyd testified about a conversation with an ITT employee concerning the procedure for filling out a loan application. "The pivotal inquiry for admission of a statement under Evid. R. 801(D)(2)(d) is whether the statement was made by an agent or employee of the party-opponent, during the existence of the relationship, concerning a matter within the scope of the employment or agency." *Davis v. Sun Refining & Marketing Co.*, 109 Ohio App. 3d at 53, 671 N.E.2d at 1057. The statements related by Scott, Allen, and Boyd were all admissions of a party opponent under Evid. R. 801(D)(2)(d).

In its last alleged error, ITT claims that the trial court erred in allowing Williams to present evidence of the filing of a separate lawsuit against ITT involving Blair, while refusing to admit ITT's proffered evidence that the suit papers were not received. The trial court properly admitted the Dupree lawsuit, which contained nearly identical complaints to those brought by Williams, under Evid. R. 404(B). Williams submitted the lawsuit into evidence to show that ITT had prior knowledge of the fraud that Blair was perpetrating on his customers, and that ITT employees were involved with Blair. ITT complains that it was not allowed to introduce evidence that would have shown it never received notice of the lawsuit. However, ITT attempted to utilize the affidavit of Frank Johnson, which was properly ruled inadmissible hearsay by the trial court. ITT could have deposed Johnson, or had him testify, if it wanted to introduce his testimony. ITT's evidentiary challenges are not well taken.

The seventh assignment is overruled in its entirety.

VI. Surprise Witnesses

In its eighth assignment, ITT argues that it was prejudiced because the trial court allowed surprise witnesses to testify at trial. On September 6, 1994, three weeks after the close of discovery, Williams sent a letter to ITT listing seven additional witnesses whom she expected to call at trial. At a hearing on December 22, 1994, the trial court denied ITT's motion to strike the witnesses. ITT specifically bases this assignment on the testimony of Jeffrey Stires.

Williams filed an affidavit from Stires after the trial ended. Stires stated that he met with ITT's attorneys for a couple of hours about a year before trial, and then again in January 1995, a few days before trial. The trial court struck this affidavit, leaving it in the record for appellate review.

The trial court should have either disallowed Stires' testimony or allowed ITT to take his deposition. However, this error will not serve as grounds for setting aside the verdict. ITT knew that Williams intended to call Stires months before trial, and had time to prepare--albeit without the benefit of a formal deposition. ITT claims that because it was unable to do formal discovery, it could only establish the hearsay nature of Stires' testimony upon cross-examination, and therefore that it was prejudiced. However, we have already rejected ITT's assertion that Stires' testimony was hearsay, and we accordingly reject ITT's claim that it was prejudiced.

Further, ITT asserts that the Ohio Supreme Court's ruling in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, 482 N.E.2d 1248, provides authority for setting aside the verdict. In *Huffman*, the court held that the trial court did not abuse its discretion in excluding a surprise expert witness. Here, however, the trial court did not exclude a witness, but allowed a "surprise" witness to testify. The trial court is vested with broad discretion with regard to admitting or excluding evidence. *Krischbaum v. Dillon* (1991), 58 Ohio St. 3d 58, 567 N.E.2d 1291. Absent a strong showing of undue prejudice or surprise, a trial court's decision to exclude or allow a witness is not an abuse of discretion. *Loura v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc.* (1995), 105

Ohio App. 3d 634, 664 N.E.2d 1002. ITT cannot show that it was prejudiced or surprised by Stires' testimony.

The eighth assignment is overruled.

VII. The Consumer Sales Practices Act

In its fourth assignment of error, ITT argues that the trial court erred in submitting to the jury Williams's causes of action under the Consumer Sales Practices Act ("CSPA"), R.C. 1345.01 et seq., and the Home Solicitation Sales Act ("HSSA"), a separate part of R.C. Chapter 1345, specifically covered by R.C. 1345.21 through 1345.28. R.C. 1345.13 allows a cause of action to be brought under R.C. 1345.01 through 1345.13 in addition to any other cause of action available to a plaintiff. See *Collins v. Kingsmen Ent., Inc.* (Jan. 19, 1995), Cuyahoga App. No. 66433, unreported; *Couto v. Gibson, Inc.* (Feb. 26, 1992), Athens App. No. 1475, unreported; *Mid-Am. Acceptance Co. v. Lightle* (1989), 63 Ohio App. 3d 590, 579 N.E.2d 721.

The CSPA was designed to protect "consumers" from unfair, deceptive, and unconscionable sales practices. R.C. 1345.02(A) states: "No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction."

R.C. 1345.03(A) states: "No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction."

These sections impose liability for unfair, deceptive, or unconscionable practices as applied to consumer transactions. A consumer transaction is defined in R.C. 1345.01(A) as: "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. 'Consumer transaction' does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers; * * *."

R.C. 5725.01 defines the institutions whose transactions are not considered "consumer transactions" under R.C. 1345.01(A), and therefore that are not subject to the CSPA. R.C. 5725.01 exempts financial institutions engaged in lending money for profit.

ITT loaned Williams money intending to make a profit, and, without more, was clearly intended to be outside the scope of the CSPA. Williams claims that ITT, involved with Blair in a civil conspiracy, provided Williams with a "package" consisting of the loan and the home-repair services. Williams asserts that ITT was so interconnected with Blair's home-repair scheme to defraud Williams that ITT was not merely acting as a lending institution, but was inseparable from Blair's home-repair business, which would be subject to the CSPA.

We need not reach the question of whether a lender of money would be subject to the CSPA if it was providing such a "package" of loans and services. Specifically, ITT was a purchase-money lender, and only made a loan to Williams. ITT was not in the home-repair business. ITT's involvement in a civil conspiracy with Blair through fraudulently concealing material information is not tantamount to showing that ITT became transformed into a provider of both loan and home-repair services.

Under R.C. 5725.01, financial institutions are not subject to the CSPA. See *Blon v. Bank One, Akron, N.A.*, 35 Ohio St. 3d at 100, 519 N.E.2d at 367, fn. 3.[11] However, Williams may sue ITT derivatively under the CSPA. ITT's "Disclosure Statement, Note and Security Agreement" signed by Williams to consummate the loan contained the following provision: "ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DE-

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[11] See, also, *Vannoy v. Capital Lincoln-Mercury Sales, Inc.* (1993), 88 Ohio App. 3d 138, 623 N.E.2d 177; *Smith v. Ohio State Home Services, Inc.* (May 25, 1994), Summit App. Nos. 16441 and 16445, unreported; *Bank One of Columbus, N.A. v. Childers* (Dec. 23, 1981), Franklin App. No. 81AP-395, unreported.

FENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER." (Emphasis sic.) This language reveals that Williams could assert any claims that she had against Blair, to whom she gave the proceeds of the loan for home repair, against ITT because Williams did not attempt to hold ITT accountable as a "financial institution," but instead asserted a claim concerning a consumer transaction based upon the actions of the seller of home- repair services.[12] See *Milchen v. Bob Morris Pontiac* (July 31, 1996), Lorain App. No. 95CA006271, unreported; *Nations Credit v. Pheanis* (1995), 102 Ohio App. 3d 71, 656 N.E.2d 998. The Federal Trade Commission requires such notice, and it was a part of Williams's contract with ITT. Section 433.2(a), Title 16, C.F.R. This "preservation of claims and defenses clause," also known as the "FTC holder rule," abrogates the holder-in-due-course doctrine to protect consumers when purchasing goods or services on credit. *Milchen v. Bob Morris Pontiac*, citing *Ambre v. Joe Madden Ford* (N.D. Ill. 1995), 881 F. Supp. 1182; *Provident Bank v. Barnhart* (1982), 3 Ohio App. 3d 316, 445 N.E.2d 746.

If the FTC holder rule did not create vicarious liability for the creditor, even where the creditor might be exempt from personal liability, "[w]hat could possibly be the point of a notice preserving 'claims and defenses which the debtor could assert against the seller' if it intended to preserve to the debtor only those claims and defenses which the debtor could assert against the creditor?" *Gill v. Fidelity Financial Servs.*,

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[12]The contract Williams signed with Blair's construction company is subject to the CSPA. See *Collins v. Kingsmen Ent., Inc.*; *Lawson v. Mack* (Apr. 19, 1991), Lucas App. No. L-90-230, unreported; *Rolling v. Ohio State Home Servs., Inc.* (July 14, 1993), Medina App. No. 2157, unreported.

Inc. (Ala. 1993), 631 So.2d 913, 914. The trial court properly presented to the jury Williams's claims under the CSPA.

Further, the record demonstrates that Blair solicited the contract with Williams at her house. The HSSA is applicable to home-improvement projects. See *Rosenfield v. Tombragel* (Dec. 31, 1996), Hamilton App. No. C-950871, unreported; *Beck v. Trane Co.* (Dec. 19, 1990), Hamilton App. Nos. C-890610 and C-890623, unreported. The trial court did not err in submitting Williams's claims for Blair's violation of the HSSA to the jury. Again, the FTC holder rule allows Williams to pursue against ITT any claim she had against Blair.

The fourth assignment is overruled.

VIII. Punitive Damages

In its fifth assignment of error, ITT contends that the $1.5 million punitive-damage award is an excessive fine that violates the Due Process Clause.

Punitive damages are awarded not to compensate a plaintiff, but to punish and deter certain conduct. See *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638, 635 N.E.2d 331, *certiorari denied* (1994), 513 U.S. 1059, 115 S. Ct. 668, 130 L. Ed. 2d 602. However, if punitive damages are the result of the jury's passion or prejudice, a new trial must be granted. *Villella v. Waikem Motors, Inc.* But ITT does not claim that the punitive-damage award was the result of the jury's passion or prejudice; ITT only claims that the punitive damages are unconstitutionally excessive.

The United States Supreme Court recently visited the issue of excessive punitive awards. In *BMW of North Am., Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809, the Court set forth three guideposts to determine whether an exorbitant award of punitive damages violates due process. The guideposts are: (1) the degree of reprehensibility of the tortious act, (2) the disparity between the harm or potential harm and the punitive award, and (3) the difference between the remedy and the civil penalties authorized or imposed in comparable cases. *Id.* at 1598-1599.

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 1599. In *Gore*, the Court held a two-million-dollar-punitive-damage award excessive where BMW concealed the fact that Gore's car had been repainted before it was sold. This concealment was not outrageous enough to warrant the huge punitive award. In contrast, in *Neibel v. Trans World Assurance Co.* (C.A.9, 1997), 108 F.3d 1123, the Ninth Circuit upheld a punitive-damage award of $500,000 against an insurance company that was involved in a conspiracy with the perpetrator of a tax-shelter scheme. "Joe Lunch Buckets"--middle-class Americans with little experience with tax laws or the legal system--were targeted and defrauded into setting up businesses at home to create a tax shelter, and to funnel large amounts of money into Trans World life insurance policies. The conduct of Trans World, which made millions of dollars thanks to the scheme, was reprehensible and warranted the award of punitive damages.

ITT's fraudulent concealment of Blair's use of his customer's funds exhibited callous indifference to the plight of Williams and other ITT customers who borrowed money for Blair's services. At age sixty-six, with a house she used to own "free and clear," Williams faced fifteen years of monthly payments, which totalled nearly half her monthly income, for the prospect of having it repaired. ITT failed to warn Williams that Blair was not using loan proceeds from new customers for their repair jobs, but for other customers whose jobs had not yet been finished. ITT perpetuated Blair's fraud on Williams with a blind eye toward her future.

ITT was ultimately interested in making high-interest, secured loans. The jury obviously believed that ITT's disregard for Williams's well-being was caused by its self-absorption in profits and the bottom line. ITT, like the insurance company in *Neibel*, prospered at the expense of its customers, who fell victim to the scam perpetrated by its referral source and furthered by ITT itself. ITT's concealment of Blair's activities--much more reprehensible than BMW's concealment of the repainting of a fender--was insidious, capable of being reproduced on unwitting customers. We can-

not say that ITT's conduct did not merit the punitive damages awarded by the jury.

Further, the disparity between the harm to Williams or the potential harm to other ITT customers referred by Blair also withstands constitutional scrutiny. ITT employees were pressured to make loans--this was how ITT made money. Blair was a source of much-needed loan referrals. ITT employees knowingly looked past Blair's financial difficulties and wrongful use of his customers' funds to keep making these loans. The harm to Williams, and the potential harm to other customers, could be enormous if ITT conspired with others to defraud their customers in similar fashion. We are inclined to view the punitive-damage award as the jury's well-intentioned message to ITT to avoid furthering the frauds of others upon those not able to fend for themselves.

The harm attributable to ITT was Blair's failure to complete the repairs on Williams's house, and possibly on others' homes if ITT made other loans on Blair's referrals. The jury awarded $15,000 in compensatory damages. The punitive-damage award is one hundred times the amount of the actual harm as determined by the jury. Although no set ratio appropriately demarcates the constitutionality of an award, the higher the ratio between compensatory damages and punitive damages, the more egregious the conduct of the defendant must be. Considering the conduct of ITT, we defer to the judgment of the jury, and we hold that the punitive-damage award did not violate the Due Process Clause.

The fifth assignment is overruled.

IX. Cross-Appeal

Williams has cross-appealed the trial court's judgment, bringing two assignments of error. Williams asserts: (1) the trial court erred in vacating the February 13, 1995, judgment entry and delaying entry of the jury's verdict until March 7, 1996, and (2) the trial court abused its discretion in the attorney-fee award by its unreasonable and arbitrary per-hour award for plaintiff's counsel and legal assistants.

A. Delay in Entering Judgment

The jury verdict was entered on January 26, 1995. Apparently against the trial judge's wishes, Williams's attorneys had the presiding judge of the court of common pleas sign the final judgment entry on February 13, 1995, when the trial judge was absent. Because the judgment was entered, ITT then filed its post-trial motions--for judgment notwithstanding the verdict, new trial, and an order compelling arbitration. At a hearing on March 9, 1995, the trial judge learned that the judgment had been entered, became upset, and vacated the entry. On April 21, 1995, a hearing was held to consider attorney fees and ITT's post-trial motions. On February 22, 1996, the trial court decided ITT's post-trial motions and the attorney fees. On March 7, 1996, the trial court entered the final judgment.

Civ. R. 58(A) states in part: "* * * upon a general verdict by the jury, upon a decision announced, or upon the determination of a periodic payment plan, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it upon the journal." Although "promptly" is not defined by the rule or case law, C.P. Sup. R. 13 states that "[t]he judgment entry specified in Civil Rule 58 and in Criminal Rule 32 shall be journalized within 30 days of the verdict, decree or decision."

Though trial courts bear the primary responsibility of journalizing entries within thirty days of a verdict, decree, or decision, the burden is secondarily on the parties to ensure that entries are timely journalized. *Kennedy v. Cleveland* (1984), 16 Ohio App. 3d 399, 476 N.E.2d 683. If a trial court fails to enter a judgment within this period, the parties--usually the prevailing party--should request the court, by way of motion or otherwise, to enter the judgment. *Id.* If such a motion or request fails, the parties may seek to com-

pel the court to enter judgment through a writ of mandamus or procedendo.[13] *Id.*

At the hearing on April 17, 1995, Williams's attorneys alerted the trial court that the judgment needed to be entered to begin the accrual of postjudgment interest. Williams asserts in her reply brief that she also submitted a second proposed judgment entry on that date and requested that the court enter it.

The trial court wished to rule on all the post-trial motions first, and promised a prompt ruling, followed by entry of the judgment. However, the judgment was not entered until nearly another year elapsed. The trial court should not delay the entry of judgment because of a dispute over the taxing of costs. *Cooper v. Morris* (Jan. 29, 1997), Marion M.C. No. 96CVE00832, unreported; Civ. R. 58(C). But a party's silence concerning the delay in entering judgment waives the issue for appeal. Cf. *Nippert v. Smith* (Dec. 29, 1993), Hamilton App. No. C-920726, unreported. However, Williams requested that the court enter the judgment nearly a year before it finally got around to it. If a trial court fails to enter judgment within thirty days of a verdict, decree, or decision, and a party's request to the court to enter the judgment is ignored, the party may on appeal challenge the failure to timely enter the judgment. Absent unusual circumstances, the prevailing party will be entitled to postjudgment interest running from the thirtieth day after the verdict, decree, or decision was rendered. Williams, therefore, is entitled to postjudgment interest from February 27, 1995.[14]

The first assignment on cross-appeal is sustained.

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[13] Obtaining a writ of mandamus or procedendo may be expeditious if the trial court denies a request to enter judgment, but would not be necessary to perfect an appeal for the delay in entering judgment.

[14] The thirtieth day from the day following the jury's verdict was a Saturday. Therefore, the time period extended to Monday, February 27. See Civ. R. 6(A).

B. Attorney Fees

Reasonable attorney fees may be awarded when punitive damages have been awarded. See *Columbus Finance Inc. v. Howard* (1975), 42 Ohio St. 2d 178, 327 N.E.2d 654.[15] A trial court should look to the factors listed in DR 2-106(B) of the Ohio Code of Professional Responsibility when determining an appropriate hourly fee for attorney fees. These factors are: the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent. See *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 569 N.E.2d 464; *Villella v. Waikem Motors, Inc.*

The trial court conducted a hearing regarding attorney fees and ruled that seventy dollars per hour was a reasonable hourly rate for Williams's attorneys. No reasons were given explaining the rationale for this figure or whether the appropriate factors were considered. Applying the factors, we can only conclude that the trial court abused its discretion in determining the attorney fees. The time and labor involved in this litigation was unquestionably enormous--the size of the record itself is ample evidence. The civil conspiracy claim was novel and complex, requiring skillful lawyering.

Williams's attorneys also obtained excellent results--1.5 million in punitive damages alone. Further, Williams's attorneys are experienced and have a strong reputation in the community as litigators. Finally, Williams's attorneys testified that their fees ranged from $125 to $200 per hour during

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[15] See, also, *Hutchinson v. J.C. Penney Cas. Ins. Co.* (1985), 17 Ohio St. 3d 198, 478 N.E.2d 1000; *Fox v. Williams* (May 28, 1996), Lawrence App. No. 95 CA 38, unreported.

the period they handled her case--well over the seventy dollars per hour granted by the trial court.

Although the determination of a reasonable amount of attorney fees is within the sound discretion of the trial court, we hold that the trial court abused its discretion in awarding attorney fees in light of the factors enumerated in *Bittner*. We remand this issue to the trial court for a proper determination of attorney fees through application of the appropriate factors.

The second assignment on cross-appeal is sustained.

X. Conclusion

The jury's verdict, grounding liability in ITT through civil conspiracy, was supported by the evidence. In appeal number C-960234, we therefore affirm the jury's grant of compensatory damages. Additionally, we affirm the punitive-damage award of $1.5 million, which was not unconstitutionally excessive and did not violate the Due Process Clause. Concerning Williams's cross-appeal, we hold that the trial court erred in delaying the entry of judgment, and therefore that postjudgment interest shall be awarded from February 27, 1995. Finally, the trial court abused its discretion in its award of attorney fees. In appeal number C-960255, we therefore reverse the trial court's judgment and remand the issue of attorney fees to the trial court, which shall enter an appropriate award based on the factors in *Bittner v. Tri-County Toyota, Inc.*

DOAN, P.J., and M.B. BETTMAN, J., concur.

WILLIAMS, Appellee,

v.

AETNA FINANCE COMPANY,

d.b.a. ITT Financial Services, Appellant, *et al.*

No. 91-2000

Supreme Court of Ohio

Submitted Oct. 13, 1992

Decided Dec. 2, 1992

APPEAL from the Court of Appeals for Hamilton County, No. C-900663.

Richard A. Bernat and William H. Blessing, Cincinnati, for appellee.

Dinsmore & Shohl, Mark A. Vander Laan and M. Gabrielle Hils, Cincinnati, for appellant.

Patricia A. Walker, Medina, urging affirmance for *amicus curiae*, Ohio Academy of Trial Lawyers.

Jones, Day, Reavis & Pogue, Michael H. Carpenter, Darrell L. Dreher and Jeffrey J. Jones, Columbus, urging reversal for *amicus curiae*, Ohio Consumer Finance Ass'n.

The appeal is dismissed as having been improvidently allowed.

MOYER, C.J., and SWEENEY, DOUGLAS, HERBERT R. BROWN and JAMES E. WALSH, JJ., concur.

HOLMES and WRIGHT, JJ., dissent.

JAMES E. WALSH, J., of the Twelfth Appellate District, sitting for RESNICK, J.

WRIGHT, Justice, dissenting.

I am writing because I believe that the trial court will be confused and dismayed by the unfortunate disposition of this appeal. I am also writing to articulate my belief that while the issue presented is straightforward, it is too important to be ignored as it has been today.

I

Appellee, Mildred Williams, and appellant, Aetna Finance Company, d.b.a. ITT Financial Services ("ITT"), entered into two contracts in which ITT agreed to lend Williams money to pay for home improvements. ITT financed the improvements through promissory notes signed by Williams. The notes contained broad arbitration clauses that provided in part: "[A]ny dispute, past, present, or future, between us or claim by either against the other or any agent or affiliate of the other, whether related to your loan, products you purchase from or through ITT Financial Services, or otherwise, shall be resolved by binding arbitration * * *. We agree that the transactions between us are in interstate commerce and this agreement shall be subject to 9 U.S.C. §[§] 1-14, as amended."

The home improvements were not completed to Williams' satisfaction and she stopped paying on the notes. She then filed suit against ITT alleging civil conspiracy, breach of contract, and violations of the Ohio Consumer Sales Practices Act. Her complaint did not refer to the arbitration clause in the promissory notes.

ITT promptly filed an application to compel arbitration and to stay the court proceedings pursuant to the requirements of the Federal Arbitration Act. In her response to the application, Williams expressly contested the validity of the arbitration provision. She argued that ITT's application should be denied because "[t]he small print, forced arbitration provision is unconscionable, deceptive, and unfair. ITT's use of this small print boilerplate is, in itself, a violation of the Ohio Consumer Sales Practices Act. The provision is void and unenforceable as a matter of law."

The trial court denied ITT's application to compel arbitration and set the case for further proceedings. The court did not explain its ruling. ITT appealed to the Hamilton County Court of Appeals. The court affirmed in a brief per curiam opinion. It wrote that "because appellee's complaint challenges the existence of a contract between the parties * * *, the arbitration clause in the loan agreement may not be en-

forced until the question of the existence of the contract is resolved." (Emphasis added.)

II

The issue on appeal to this court is whether it was proper for the trial court to deny ITT's motion to compel arbitration when the validity of the arbitration provision itself was challenged by Mildred Williams. I read today's disposition of this matter to require that the trial court first consider the narrow issue of whether the agreement to arbitrate is valid. That is the result required by the Federal Arbitration Act.

A

The Federal Arbitration Act provides that in a transaction involving interstate commerce an agreement to settle a controversy by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2, Title 9, U.S. Code. When such an agreement exists and a motion to compel arbitration is filed, the court must order arbitration as long as it is sure that "the making of the agreement for arbitration or the failure to comply therewith is not in issue." Section 4, Title 9, U.S. Code. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270, the United States Supreme Court considered these provisions. The court held that when a contract contains a broadly worded arbitration clause the question of whether the entire contract is invalid due to fraud in the inducement must be decided by an arbitrator. However, "if the claim is fraud in the inducement of the arbitration clause itself--an issue which goes to the 'making' of the agreement to arbitrate--the federal court may proceed to adjudicate it." 388 U.S. at 403-404, 87 S. Ct. at 1806, 18 L. Ed. 2d at 1277. In short, a court "may consider only issues relating to the making and performance of the agreement to arbitrate." *Id.* at 404, 87 S. Ct. at 1806, 18 L. Ed. 2d at 1277.

Conformance with the Federal Arbitration Act was expressly required of the state courts in *Southland Corp. v. Keating* (1984), 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985), 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444, the

Supreme Court commented on the procedure that lower courts must follow in ruling on motions to compel arbitration: "* * * [T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" 473 U.S. at 626, 105 S. Ct. at 3353, 87 L. Ed. 2d at 454-455. The court explained that even when the rights asserted by the party opposing arbitration are based on state statutory rights, the broad provisions of the Federal Arbitration Act apply. *Id.* at 626, 105 S. Ct. at 3354, 87 L. Ed. 2d at 455. The justices cautioned, however, that the courts must "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Id.* at 627, 105 S. Ct. at 3354, 87 L. Ed. 2d at 455.

B

The court of appeals below erred in resting its judgment on an incorrect statement of the law. Contrary to the court's opinion, when there is an enforceable arbitration provision, questions regarding the validity of the contract are to be decided by an arbitrator. *Prima Paint*, 388 U.S. at 404, 87 S. Ct. at 1806, 18 L. Ed. 2d at 1277.

In response to ITT's application to compel arbitration, however, Williams explicitly challenged the validity of the arbitration clause. Williams argued that the arbitration clause was "unconscionable, deceptive, and unfair." Under the United States Supreme Court cases construing the Federal Arbitration Act, Williams' challenge must be dealt with by the trial court prior to deciding whether to compel arbitration. If the court finds that the arbitration clause is valid, it must compel arbitration. If the clause is not valid, the court must deny arbitration; only then can it consider issues concerning the contract generally.

To interpret the Act otherwise would render the "saving clause" in Section 2, Title 9, U.S. Code a nullity. The clause states that an arbitration provision is enforceable "save upon

such grounds as exist at law or in equity for the revocation of any contract." In *Prima Paint* the court noted that: "As the 'saving clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract--a situation inconsistent with the 'saving clause.'" 388 U.S. at 405, 87 S. Ct. at 1806, 18 L. Ed. 2d at 1277, fn.12. While the validity of the entire contract is left to the arbitrator to decide, the validity of the arbitration agreement itself is "saved" for the court's decision by Section 2 of the Act.

C

No one questions the increasing importance of arbitration as a method of dispute resolution. The number of commercial arbitrations grows each year. Arbitrations initiated with the American Arbitration Association, for example, grew from 6,140 in 1980 to 12,350 in 1989. Hoeniger, Commercial Arbitration Handbook (1991) 1-1. The record in this case shows that as of June 1990 appellant ITT alone had filed eighty-seven Hamilton County delinquent loan cases with the National Arbitration Forum, Inc.

This court has stressed the important role arbitration should play in dispute resolution. As long ago as 1954 we wrote that "[i]t is the policy of the law to favor and encourage arbitration * * *." *Campbell v. Automatic Die & Products Co.* (1954), 162 Ohio St. 321, 329, 55 O.O. 195, 198, 123 N.E.2d 401, 405; see, also, *Bellaire Bd. of Edn. v. Paxton* (1979), 59 Ohio St. 2d 65, 70, 13 O.O.3d 58, 61, 391 N.E.2d 1021, 1024 ("[w]e endorse the policy in favor of enforcing arbitration contracts to promote speed and efficiency and to lessen the burdens on the court system"). But to encourage arbitration, only to decline to provide guidance on such a basic issue as that presented in this case is to avoid our judicial responsibilities. If we desire effective and efficient dispute resolution we must act to clarify arbitration law when the need and opportunity to do so presents itself. This is such a time.

III

In her reply to ITT's motion to compel arbitration Williams challenged the validity of the arbitration provision. Under controlling federal law the first issue the court must rule on when there is a broad arbitration provision is the validity of the agreement to arbitrate.

While today's disposition appears to mean that the court of common pleas should conduct a hearing on the limited issue of whether the arbitration agreement itself is invalid, our dismissing this appeal lets stand a court of appeals opinion that misstates the law. I would join in an opinion affirming the court of appeals' judgment but correcting and clarifying the basis for its decision.

HOLMES, J., concurs in the foregoing dissenting opinion.

Mildred WILLIAMS, Plaintiff-Appellee

v.

AETNA FINANCE COMPANY,
d.b.a. ITT Financial Services, Defendant-Appellant,

Christopher Blair, d.b.a. Homestead Construction Co.,
et al., Defendants

No. C-900663
Court of Appeals of Ohio, First District, Hamilton County
Aug. 9, 1991

JUDGMENT ENTRY

GORMAN, Judge.

This appeal, having been heretofore placed on the accelerated calendar, is being considered pursuant to App. R. 11.1(E) and Local Rule 12 and shall not be considered controlling authority except as provided in Rule 2(G)(1) of the Supreme Court Rules for the Reporting of Opinion.

Wherefore, the single assignment of error is not well taken because appellee's complaint challenges the existence of a contract between the parties and, therefore, the arbitration clause in the loan agreement may not be enforced until the question of the existence of the contract is resolved. Accordingly, the trial court properly denied appellant's application for an order compelling arbitration. See *Rodriguez de Quijas v. Shearson/American Express, Inc.* (1989), 490 U.S. 477, 109 S. Ct. 1917.

Therefore, the judgment of the trial court is affirmed.

It is Ordered that a certified copy of this Judgment Entry shall constitute the mandate to the trial court pursuant to App. R. 27.